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Supreme Court, U.S.
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Supreme Court of the United States

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SHELDON SILVER, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH-NATIONAL SOCIETY OF HEBREW DAY SCHOOLS and UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Petitioners,

v.

COMMACK SELF-SERVICE KOSHER MEATS, INC. D/B/A COMMACK KOSHER, BRIAN YARMEISH, AND JEFFREY YARMEISH,

Plaintiffs-Respondents,

and

RABBI LUZER WEISS, AS DIRECTOR OF THE KOSHER LAW ENFORCEMENT DIVISION OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS,

Defendant-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Establishment Clause bars a state legislature from protecting purchasers of food labeled "kosher" by (a) statutorily defining the term "kosher" to reflect consumer consensus -- *i.e.*, food prepared in accordance with "orthodox Hebrew religious requirements" and (b) punishing only vendors who use the term "kosher" with "intent to defraud."

CORPORATE DISCLOSURE STATEMENT

Agudath Harabonim of the United States and Canada, Agudath Israel of America, National Council of Young Israel, Rabbinical Alliance of America, Rabbinical Council of America, Torah Umesorah-National Society of Hebrew Day Schools and the Union of Orthodox Jewish Congregations of America have no parent corporations and no publicly held corporation holds 10% of more of their stock.

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No. 02-

IN THE

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SHELDON SILVER, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH-NATIONAL SOCIETY OF HEBREW DAY SCHOOLS and UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-32a, *infra*) is reported at 294 F.3d 415. The opinion of the district court (Pet. App. C, pp. 35a-66a, *infra*) is reported at 106 F.Supp. 2d 445.

JURISDICTION

The decision of the court of appeals was issued on May 21, 2002. Timely petitions for rehearing were filed by the Attorney General of New York and by the intervenor-defendants. The intervenor-defendants' petition for rehearing and rehearing *en banc* was denied on August 1, 2002 (Pet. App. B, pp. 33a-34a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

N.Y. Agriculture & Markets, Law §§ 26-a, 201-a, 201-b(1), 201-c, 201-e(2-a), and 201-e(3-c) are set forth in Appendix E, pp. 100a-108a, *infra*.

STATEMENT

1. New York's Kosher Fraud Laws

New York Agric. & Mkts. Law § 201-a provides, in pertinent part, that "[a] person who, with intent to defraud, sells or exposes for sale any . . . food products, and falsely represents the same to be kosher . . ., or as having been prepared under . . . the orthodox Hebrew religious requirements," is guilty of a class A misdemeanor, "except that a person who with intent to defraud sells . . . meat . . . and falsely represents the same to be kosher . . . provided said meat . . . in violation has a retail value in excess of five

thousand dollars . . . is guilty of a class E felony." Section 201-b provides for similar penalties if a person "with intent to defraud, sells . . . in any hotel, restaurant, or other place . . . food or food products, and falsely represents the same to be kosher . . . or as having been prepared under . . . the orthodox Hebrew religious requirements."

2. The Plaintiffs' Lawsuit

The plaintiffs filed this action on April 16, 1996, challenging the constitutionality of the above provisions on their face. Although the complaint described a series of specific encounters between the plaintiffs and the New York State Department of Agriculture and Markets that are summarized in the district court's opinion (pp. 41a-43a, *infra*) and in the opinion of the court of appeals (pp. 5a-9a, *infra*), the complaint was not limited to a challenge of the particular enforcement of the kosher fraud laws as applied to the plaintiffs. Instead, the plaintiffs asserted a facial challenge against the constitutionality of New York's kosher fraud laws.

Plaintiffs first alleged that the word "kosher" and the phrase "orthodox Hebrew religious requirements," as used in the kosher fraud laws, are "unconstitutionally vague for want of any ascertainable standard," in violation of the Due Process Clause of the Fourteenth Amendment. Complaint at ¶¶ 195-196, 235 (J.A. 44, 48).[1] *Second*, plaintiffs contended that the statutes violate the Establishment Clause of the First Amendment "[by adopting] orthodox Hebrew religious requirements" as the criteria for compliance. *Id.* at ¶¶ 203, 209-223 (J.A. 45-47). *Third*, plaintiffs maintained that equating "kosher" with "orthodox Hebrew religious requirements" deprived them of their First Amendment

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[1] "J.A." represents the Joint Appendix filed in the court of appeals.

rights to free exercise of religion and their Fourteenth Amendment rights to equal protection of the laws. *Id.* at ¶¶ 201-202, 227 (J.A. 44, 47).

3. District Court Proceedings

In December 1996, the petitioners, who are Orthodox Jewish organizations, individual consumers of kosher products, and vendors of kosher products, were permitted to intervene as defendants (J.A. 6). On December 15, 1997, the district court denied a motion by the State defendant (opposed by the intervenors) to dismiss on grounds of the *Pullman* abstention. *Commack Self-Service Kosher Meats v. Rubin, et al.*, 986 F. Supp. 153 (E.D.N.Y. 1997). The court found that the "statutory provisions at issue in this case have been interpreted for decades as equating 'kosher' with 'prepared in accordance with orthodox Hebrew requirements'" 986 F. Supp. at 156. The court concluded, "Because there exists a well established interpretation of the Kosher Laws by the New York state courts, and because the constitutional challenges raised by plaintiffs are not 'entangled in a skein of state law that must be untangled before the federal case can proceed,' *McNeese v. Bd. of Educ. for Community Unit School Dist. 187*, 373 U.S. 668, 674, 83 S.Ct. 1433, 1437, 10 L. Ed. 2d 622 (1963), there is no basis for abdicating federal jurisdiction." 986 F. Supp. at 157-58.

In June 1998, plaintiffs moved for a preliminary injunction. On June 18, 1998, by oral order, the district court denied plaintiffs' application (J.A. 12). Plaintiffs then took the depositions of Rabbi Schulem Rubin, Philip Schnell, Michael McCormick, Rabbi Yehuda Kravitz, Rabbi Aryeh Ralbag, Rabbi Moshe Portnoy, and David Zweibel. Thereafter, cross-motions for summary judgment were filed by the plaintiffs, the defendant, and the intervenors (J.A. 19).

4. The District Court's Decision

On July 28, 2000, the District Court issued a decision granting the plaintiff's motion for summary judgment and denying the cross-motions for summary judgment of the defendant and the intervenors. The district court held that New York's kosher fraud laws are unconstitutional on their face because they "require the sponsorship, financial support and active involvement of New York State in the daily monitoring of the compliance of vendors of kosher products with a set of religious dietary laws, which are incorporated by reference into the Challenged Laws." 106 F. Supp.2d at 454-55 (p. 56a, *infra*). The court held that the enforcement of the kosher fraud laws constitutes "excessive entanglement" with religious doctrine and amounts to "an impermissible state advancement of religion." *Id.* at 457, 459 (pp. 60a, 61a, *infra*).

5. The Court of Appeals' Decision

The court of appeals affirmed with an opinion by Judge Miner. It held that under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), New York's kosher fraud laws "have a primary effect that both advances and inhibits religion" (p. 18a, *infra*). The court of appeals found that "the entanglement of the State and religious authorities is extensive and contributes to a primarily religious effect" (p. 19a, *infra*). It based this conclusion on the following three premises regarding New York's laws, which are demonstrably erroneous (p. 19a, *infra*):

> [t]hey (1) take sides in a religious matter, effectively discriminating in favor of the Orthodox Hebrew view of dietary requirements; (2) require the State to take an official position on religious doctrine; and (3)

> create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria.

The court of appeals acknowledged that "the challenged laws were enacted for the secular purpose of protecting consumers from fraud in the kosher food market" (pp. 30a-31a, *infra*), but it concluded on the basis of no evidence whatever and contrary to the position of New York's Attorney General that the "avowed purpose" of New York's kosher fraud laws "is amply covered by the existing general fraud laws" (p. 31a, *infra*).

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT HAS MISAPPLIED THIS COURT'S ESTABLISHMENT CLAUSE CASES TO INVALIDATE AN IMPORTANT CONSUMER PROTECTION LAW IN NEW YORK AND 17 OTHER STATES

Since 1915, the State of New York has protected Jewish consumers and others who wish to purchase "kosher" food products by providing criminal sanctions against vendors who, with "intent to defraud," falsely label their products as "kosher." New York has, from the outset, defined the term "kosher" by the standard understood by a consensus of consumers of kosher food -- "orthodox Hebrew religious requirements." Fifteen other States have enacted

their own laws protecting kosher consumers using the same "orthodox Hebrew religious requirements" standard, and two States -- Illinois and Pennsylvania -- utilize substantially equivalent terms.[2] See the text of these laws in Appendix D, pp. 67a-99a, *infra*.

No Establishment Clause decision of this Court has ever invalidated a local law enacted to protect religiously observant Americans against deliberate deception by dishonest merchants who *intend* to defraud consumers. Nonetheless, the court below relied on decisions of this Court applying the First Amendment to the wholly dissimilar areas of financial aid to religious institutions and to public prayer to strike down a venerable consumer-protection measure that has done no harm and accomplished much good in more than 85 years of its administration. It did so on the erroneous and self-contradictory proposition that kosher fraud laws "both impermissibly advance and impermissibly inhibit religion in violation of the Establishment Clause" (p. 30a, *infra*).

The constitutional issue is whether the State of New York may protect consumers in the State by forbidding vendors who sell food labeled "kosher" from *intentionally* defrauding their customers. The kosher fraud laws, as provided explicitly in the statute and interpreted by the New York courts, apply *only* to vendors who *deliberately* mislabel food they *know* to be non-kosher by the statutory standard, thereby commanding higher prices from customers who are willing to pay significantly more for food they believe to be kosher under the commonly understood standard.

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[2] In Illinois, the prescribed statutory standard is the "Code of Jewish Laws" (see pp 72a-73a, *infra*) and in Pennsylvania it is "the requisites of traditional Jewish law" (see p. 94a, *infra*).

By referencing the Orthodox Jewish standard, New York and 15 other States have not, in any sense, created or aided an establishment of religion. Rather, they reflect in their statutes what consumers expect when they see food advertised as "kosher" -- that the food will be kosher according to the standards that have governed Jewish observance for many centuries. The bedrock principle of consumer-protection law -- that vendors must abide by the reasonable expectations and inferences their labels raise with the least sophisticated customers -- applies to claims that a product is "kosher," just as it would to any other representation.

Any vendor who legitimately believes that the product he labels "kosher" is in fact kosher by Orthodox Jewish standards has not violated the statute. As this Court stated with respect to the New York kosher fraud statute in *Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 501-502 (1925):

> [W]hatever difficulty there may be in reaching a correct determination as to whether a given product is kosher, appellants are unduly apprehensive of the [negative] effect upon them and their business, of a wrong conclusion in that respect, since they are not required to act at their peril but only to exercise their judgment in good faith, in order to avoid coming into conflict with the statutes. Indeed, putting the statutes aside, such judgment they would be bound to exercise upon ordinary principles of fair dealing. By engaging in the business of selling kosher products they in effect assert an honest purpose to distinguish to the best of their

judgment between what is and what is not kosher. The statutes require no more.[3]

Even if there were a prospect of uncertainty as to whether a particular case would or would not be prosecuted, that uncertainty would not sustain a facial challenge to the statute. If the statute creates constitutional problems in rare cases, the courts should wait until those cases arise before deciding them. *See Hernandez v. Commissioner*, 490 U.S. 680, 698 n. 12 (1989) (declining to consider the possibility

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[3] *See also State v. Glassman*, 441 N.Y.S. 2d 346, 348 (N.Y. County Ct. 1981) (dismissing State's complaint after finding that "defendants did not intentionally deceive or defraud the public into the belief that the products . . . were prepared in a kosher manner"); *People v. Atlas*, 170 N.Y.S. 834, 835 (1st Dep't 1918) (holding that the statute "only operates on those who knowingly violate its provisions").

Under the New York statute, vendors are only in violation if the State can prove that they *intentionally* defrauded their consumers. No innocent vendor is subjected to a debatable definition of the word "kosher." If there is a legitimate dispute about the dietary standards, the vendor prevails. *See Glassman*, 441 N.Y.S. 2d at 348; *see also Korn v. Rabbinical Council of California*, 195 Cal. Rptr. 910, 915 (1983) ("if rabbinic authorities' interpretation of Judaic law render disparate findings concerning the status of meat purported to be kosher, the court lacks jurisdiction to settle the dispute").

This is consistent with other courts' interpretations of similar kosher fraud statutes. The California Supreme Court, for example, followed the *Hygrade* reasoning to allow the prosecution of a vendor under California's kosher-fraud ordinance. *Erlich v. Municipal Court of Beverly Hills Judicial Dist.*, 360 P.2d 334, 335-36 (Cal. 1961). Because the California statute -- like the one at issue here -- required specific intent to defraud, the California Supreme Court stated that any problem a vendor might have in reaching a definition of "kosher" was irrelevant. *Id.* at 337. Likewise, an intermediate appellate court in Florida has upheld that state's kosher-fraud statute against an Establishment Clause challenge. *Sossin Systems, Inc. v. City of Miami Beach*, 262 So. 2d 28 (Fla. Dist. Ct. App. 1972).

that, under certain circumstances, a tax regulation might raise *Lemon* test entanglement concerns).

The central premise of the decision rendered by the court below was rejected by this Court in *United States v. Ballard*, 322 U.S. 78 (1944). The defendants in that case -- like the plaintiffs in this one -- claimed that the Religion Clause of the First Amendment barred the government from interfering with the fraud they were perpetrating because they lied on questions of faith. The defendants in the *Ballard* case, who had solicited funds through the mails with representations regarding their supernatural powers and were indicted for mail fraud, claimed that their criminal trial was a constitutionally prohibited inquest of their religious beliefs.

All the Justices of this Court save one (Jackson, J.) rejected that contention. Chief Justice Stone – speaking for two Justices in addition to himself – would have affirmed the defendants' convictions, and his language applies fully to the constitutional claims made by the plaintiffs and accepted by the courts below in this case (322 U.S. at 88-89; citations omitted):

> I am not prepared to say that the constitutional guaranty of freedom of religion affords immunity from criminal prosecution for the fraudulent procurement of money by false statements as to one's religious experiences, more than it renders polygamy or libel immune from criminal prosecution. I cannot say that freedom of thought and worship includes freedom to procure money by making knowingly false statements about one's religious experiences.

The dispute here also involves governmental regulation designed to prevent "the fraudulent procurement of money," in this case by an intentional misrepresentation regarding the religious acceptability of the ingredients used in the preparation of food. The question here – as in *Ballard* – is whether the appellees have the "freedom to procure money by making knowingly false statements" regarding a subject that touches religious belief. Are merchants who know that the products they sell as "kosher" are unacceptable by "orthodox Hebrew religious requirements" constitutionally entitled to commit fraud on the consuming public because their fraud concerns religious dietary laws? *Ballard* squarely holds that they have no such constitutional right.

II.

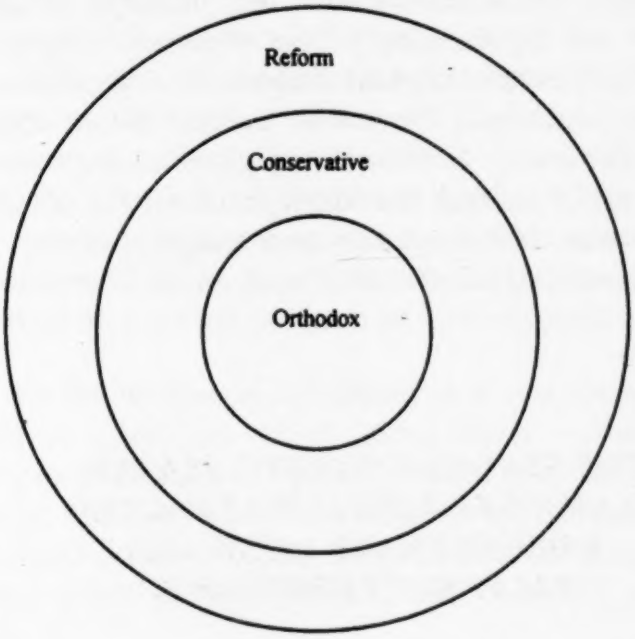
THE SECOND CIRCUIT'S STATED REASONS FOR INVALIDATING THE KOSHER FRAUD LAWS ARE PALPABLY ERRONEOUS

A. The New York Kosher Fraud Laws Do Not "Take Sides."

The panel declared that it is "indisputable that there are differences of opinion within Judaism regarding the dietary requirements of *kashrut*," and it reasoned that "because the challenged laws interpret 'kosher' as synonymous with the views of one branch, those of Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism" (p. 21a, *infra*).

But the panel significantly misapprehended the nature of the "differences of opinion" within Judaism over the requirements of kashrut. *Everyone* accepts food that is

kosher by Orthodox standards as being kosher. Conservative Jews accept additional foods as kosher, and Reform Jews apply even less stringent standards. The "differences of opinion" may be graphically portrayed as a series of concentric circles:



The New York kosher fraud laws prohibit vendors from describing food as "kosher" unless it satisfies the most demanding standard – the inner circle in the above diagram. Hence the laws are not "taking sides" in any dispute. They are merely prescribing the standard that meets the expectations of *all* consumers who are willing to pay substantially more for a food product that is "kosher."

The panel ignored the affidavits prepared and submitted in *Ran-Dav's County Kosher, Inc. v. New Jersey*, 608 A.2d 1353, 129 N.J. 141 (1992), *cert. denied*, 507 U.S. 952 (1993), which was a part of the record in this case (J.A.

1093-1102). Those affidavits were signed by the presidents of the Reconstructionist, Reform, Conservative and Orthodox rabbinic organizations in New Jersey. Their content was summarized in the *amicus* brief filed by the Anti-Defamation League of B'nai B'rith in the New Jersey appellate court: "[A]ll branches of Judaism accept the kosher requirements which have been developed in the Orthodox tradition over the centuries as the standard applicable to all, whether liberal or traditional in observance" (J.A. 232). In the Supreme Court of New Jersey, the Anti-Defamation League summarized the affidavits as follows (J.A. 229):

> The affidavits filed in connection with this appeal demonstrate that Jewish authorities in New Jersey uniformly hold that kosher dietary standards are those established by Orthodox Judaism.

The New York kosher fraud law does not exclude anyone who is not Orthodox. The law simply defines the term "kosher" when used commercially by a common understanding of that term. A purchaser interested in buying kosher food will accept "orthodox Hebrew religious" standards as adequate. Indeed, incorporating Conservative standards into the term "kosher" would be exclusionary because it would disappoint the needs and expectations of those who understand the term to mean what it has meant for many centuries of Jewish life across the globe.

The court below relied on the 4-to-3 decision of the New Jersey Supreme Court in *Ran-Dav's Country Kosher, Inc. v. New Jersey*, *supra*. The New Jersey law invalidated in *Ran-Dav's* differed, however, in various critical respects, from the New York law involved in this case. *See* pp. 18-19, n. 5, *infra*. And, in any event, scholarly commentators on the *Ran-Dav's* decision have disagreed with the views of the

four-person majority of the New Jersey Supreme Court. *See* Catherine Beth Sullivan, *Are Kosher Food Laws Constitutionally Kosher?*, 21 B.C. Envtl. Aff. L. Rev. 201, 245 (1993) ("Ran-Dav was wrongly decided."); Stephen F. Rosenthal, *Food For Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 Geo. Wash. L. Rev. 951, 1012 (1997) ("Although kosher fraud laws present close calls at a number of doctrinal nodes, this Article has shown that a reasonable argument can be made for their constitutionality."); Kristin Morgan, *The Constitutionality of New Jersey Kosher Food Regulations Under the Establishment Clause*, 62 U. Cin. L. Rev. 247, 282 (1993); Shelley R. Meacham, *Answering to a Higher Source: Does the Establishment Clause Actually Restrict Kosher Regulations as Ran-Dav's County Kosher Proclaims?*, 23 Sw. U. L. Rev. 639, 660 (1994) ("Consequently, the Establishment Clause does not prohibit states from enacting and enforcing consumer protection regulations, similar to the New Jersey regulation, governing kosher food products.")[4]

B. The Term "Kosher," Like the Term "Organic," May Be Narrowly Defined.

The legislatures of New York and 17 other States have defined the term "kosher" in accordance with its most narrow understanding -- which provides the greatest protection to consumers. The United States Department of

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[4] Other commentators have read the *Ran-Dav's* and *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337 (4th Cir.1995), decisions as invalidating existing kosher fraud laws throughout the United States. Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. Chi. L. Rev. 667, 696 (1993) ("The Kosher food laws in most states thus violate the Constitution."); Karen Ruth Lavy Lindsay, *Can Kosher Fraud Statutes Pass the Lemon Test?: The Constitutionality of Current and Proposed Statutes*, 23 U. Dayton L. Rev. 337, 369 (1998).

Agriculture followed a similar course when it issued regulations on October 21, 2002, permitting agricultural foods to be labeled "Organic" only if they are at least 95 percent "organically produced raw or processed agricultural products." 7 C.F.R. § 205.301(b). Foods may be labeled "made with organic ingredients" only if they contain "at least 70 percent organically produced ingredients." 7 C.F.R. § 205.301(c). Obviously, many people may view products that are 85 percent organic as "organic," and products that have 50 or 60 percent organic ingredients are literally "made with organic ingredients." Nonetheless, the Department of Agriculture touted this recent announcement as establishing "the highest organic production and handling standards in the world." United States Department of Agriculture, Consumers Brochure "The National Organic Program," p. 1 (October 2002). The Secretary of Agriculture announced that the purpose of the program is to "create consumer confidence." Release No. 0453.02, United States Department of Agriculture, October 21, 2002.

When the Wool Products Labeling Act, 15 U.S.C. § 68 (b), prohibits the word "wool" from being used as a label in interstate commerce unless it relates to "fiber from the fleece of the sheep or lamb or hair of the Angora or Cashmere goat (and may include the so-called specialty fibers from the hair of the camel, alpaca, llama and vicuna)," that law simply defines -- in a meaning that ordinary consumers ascribe to it -- the word "wool." Similarly, the Food and Drug Administration may prescribe standards of identity and labels that are used on dietary supplements such as vitamins and minerals. *See National Nutritional Foods Ass'n v. Food and Drug Administration*, 504 F.2d 761 (2d Cir. 1974), *cert. denied*, 420 U.S. 946 (1975). This Court said in *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 228-29 (1943), that in order to prevent "consumer confusion" and to "promote honesty and fair

dealing," Congress may direct that standards of identity be fixed for common articles of food.

By the same token, New York and 15 other States have chosen to define the term "kosher," in order to create "consumer confidence," by the standard that has been accepted by Jewish consumers for centuries. There may be consumers and vendors who believe that food is "kosher" even if it does not satisfy "Orthodox Hebrew religious requirements" because it meets the standards of Conservative Jews, but the legislatures of New York and 15 other States have, in effect, adopted "Orthodox Hebrew religious requirements" as the definition that best protects consumers.

C. The State Does Not Take Any Official Position on Religious Doctrine.

By referencing the Orthodox Jewish standard, New York has not, in any sense, taken an official position on religious doctrine. Rather, New York reflects in its statute what consumers expect when they see food advertised as "kosher" -- that the food will be kosher according to Orthodox Jewish law.

The testimony of various deponents in the discovery conducted by the plaintiffs proves this point. When Rabbi Aryeh Ralbag, representative of the Agudath Harabonim of the United States and Canada, was asked his understanding as to why the term "orthodox Hebrew religious requirement" was used in the law, he replied (J.A. 236):

> My understanding is that in order to protect the consumer against fraud and misrepresentation the words Orthodox Hebrew religious requirements were used. The phraseology Orthodox requirement were used

> in the law this being a general broad consensus of what most people would expect the product or the establishment to be when thinking that they are buying kosher.

He further explained that this particular phrase "was used in the law to insure that ... what most consumers expect kosher to be that is what kosher is" (J.A. 238; *see also* J.A. 239, 243). This same understanding was echoed by Rabbi Yehuda Kravitz, the designee of the Union of Orthodox Jewish Congregations of America, who explained that the New York statute defines kosher to reflect the understanding of the "kosher consumer at large" (J.A. 250).

Judge Miner's opinion for the court below rested on a misunderstanding of the laws governing kosher food. In almost every instance, the kosher dietary standards are clear, undisputed, and remarkably simple. Meat from a pig or a camel, for example, does not comply with the dietary standards of *kashrut*. Lamb, beef and chicken does. Meat cooked with milk or other dairy products does not comply with the dietary standards. Fish having scales and fins (*i.e.*, not shellfish) do. 6 *Encyclopaedia Judaica* 26-27 (Macmillan Publishing Co. 1971). The determination never depends on any spiritual factor. It is solely a question of the food's physical attributes.

The opinion of the three-member minority of the New Jersey Supreme Court in *Ran-Dav's County Kosher, Inc. v. New Jersey*, *supra,* provides a more accurate description of the meaning of "kosher" than did Judge Miner's opinion for the Second Circuit. Justice Stein of the New Jersey Supreme Court observed in his dissent (1) that enforcement of kosher fraud laws "entails straightforward, objective, factual inquiries," (2) that there is "longstanding and established precedent recognizing that 'kosher' has a

meaning in the trade sufficiently well-developed to permit enforcement of kosher regulations," and (3) that "objective, uniform criteria [are used] to identify and address instances of consumer fraud in kosher products." 608 A.2d at 1367-68; 129 N.J. 141, 169-70. He and two colleagues on the New Jersey Supreme Court would have rejected the facial challenge made in that case, and this Court should do the same.

To be sure, there are disagreements among rabbinical authorities at the periphery of the laws of *kashrut* as to whether certain foods are kosher. But that does not mean that the entire set of Jewish dietary laws is open to differing interpretations. More importantly, the fact that such minor disputes may exist is irrelevant to the facial constitutionality of this statute. The only question before this Court when a statute is subjected to a facial challenge is whether the statute could *ever* be enforced constitutionally. *See Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 779-80 (1973). There is no doubt that the New York kosher fraud laws can and have been enforced with no constitutional uncertainties for more than 85 years. In the extensive history of enforcement of the New York kosher fraud laws "no cases have come to light of any great variance in the interpretation of what was religiously Kosher." *Ran-Dav's County Kosher v. New Jersey,* 579 A.2d 316, 326 n.17, 243 N.J. Super. 232, 253 (N.J. Super. 1990), *rev'd on other grounds*, 608 A.2d 1353, 129 N.J. 141 (1992), *cert. denied*, 507 U.S. 952 (1993).[5]

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[5] New York's kosher fraud laws are distinct from the regulation and ordinances struck down in *Ran-Dav's* and in *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337 (4th Cir. 1995). The New Jersey regulation at issue in *Ran-Dav's* punished *any* mislabeling of non-kosher food, even if the vendor acted in good faith, honestly and reasonably believing that the food was kosher and having absolutely no intent of defrauding anyone. *See Ran-Dav's*, 608 A.2d at 1359, 129 N.J.

Incorporation of an Orthodox standard in the administration of the kosher fraud statutes provides no financial support to any particular religious organization or denomination. Nor do New York's kosher fraud statutes encourage anyone to abide by the dietary practices of Orthodox Judaism. The law simply says to vendors: "You may sell any kind of food you choose and believe anything you wish, but you cannot deceive consumers by using the term 'kosher,' when you know that the food you are selling does not meet the consensus understanding of that term." Such a consumer fraud statute, directed only at the commercial conduct of vendors, does not erode governmental neutrality regarding religious matters.

D. Civic Authority Is Not Delegated According to Religious Criteria.

The panel erroneously believed that the Kosher Advisory Board exercises governmental authority. Appendix A, pp. 25a-27a. But the advisory board is not a religious organization. Nor does it have any legal or administrative power to determine the standards for enforcement of the kosher fraud laws. It is, as its title declares, "advisory" only.

141, 153. Under New York's statutory scheme no vendor can be prosecuted if he has a good-faith belief that his products are kosher by Orthodox standards. Moreover, the opinion of the three dissenting Justices in the New Jersey Supreme Court in *Ran-Dav's* is more persuasive than the opinion of the four Justices in the majority.

The Baltimore ordinance considered by the Fourth Circuit in *Barghout* did not simply define "kosher" as satisfying "orthodox Hebrew requirements." It required the *direct participation* of three duly ordained Orthodox rabbis selected from a list submitted by Orthodox religious institutions. These rabbis had the authority to administer the ordinance and to inspect premises and report violations of the ordinance to the state enforcement authorities. 66 F.3d at 1339.

This is not a case, like *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), in which governmental powers have been delegated to religious institutions. Whereas the statute struck down in *Larkin* delegated zoning powers to religious institutions, the advisory board's role is limited entirely to making recommendations on matters of policy concerning the administration of the kosher fraud laws. The Board does not enforce the law. It is an unpaid "sounding-board" for the Commissioner of the Department of Agriculture and Markets. And there is no requirement that the members of the board represent a particular religious organization, or even be Jewish.

III.

THE SECOND CIRCUIT'S DECISION IGNORES THE REASONING OF THIS COURT'S RECENT ESTABLISHMENT CLAUSE DECISIONS

Judge Miner's heavy emphasis on "the entanglement factor" under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), ignored the conclusion of the majority opinion in *Agostini v. Felton*, 521 U.S. 203 (1997), that held that "excessive entanglement" should not be evaluated separately but only "as an aspect of the inquiry into a statute's effect." 521 U.S. at 233. When the result of the "entanglement" inquiry is the conclusion reached by the opinion below in this case -- that the "entanglement" has "a primary effect that both advances and inhibits religion" (p. 18 a, *infra*; *see also* p. 30a, *infra*) -- the alleged "entanglement" is not a reason to invalidate the law on constitutional grounds. It is what *Agostini* recognized to be permissible "inevitable" interaction in the administration of a constitutionally sound law. 521 U.S. at 233.

The decision below also failed to take into account this Court's recent decisions in *Mitchell v. Helms*, 530 U.S. 793 (2000); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002). In all three recent decisions this Court narrowed the theoretical reach of the Establishment Clause. The conduct challenged under the Establishment Clause in each of these cases involved some measure of "entanglement" between government authorities and religious institutions. This Court held that this interaction did not bar the religious institutions from receiving a benefit that could unquestionably be given to their secular equivalents. The same reasoning applies to this case and invalidates the "entanglement" rationale articulated by the court below.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT
August Term, 2000

(Argued: June 28, 2001 Decided: May 21, 2002)

Docket Nos. 00-9116, 009118

COMMACK SELF-SERVICE KOSHER MEATS, INC., d/b/a Commack Kosher, BRIAN YARMEISH and JEFFREY YARMEISCH,

Plaintiffs-Appellees,

- v. -

RABBI LUZER WEISS, as Director of the Kosher Law Enforcement Division of The New York State Department of Agriculture and Markets,

Defendant-Appellant,

HON. SHELDON SILVER, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH NATIONAL SOCIETY OF HEBREW DAY SCHOOL AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Intervenors-Defendants-Appellants.

Before: MINER, LEVAL, and POOLER, Circuit Judges.

Appeal from a summary judgment in favor of plaintiffs, an entity engaged in the sale of meat products and its owners, entered in the United States District Court for the Eastern District of New York (Gershon, J.) in an action challenging the constitutionality of certain New York State kosher fraud statues, the court having found that the challenged provisions on their face violate the Establishment Clause because they excessively entangle the State of New York with religion and impermissibly advance Orthodox Judaism.

Affirmed.

ROBERT JAY DINERSTEIN, Dinerstein & Lesser, P.C., Commack, NY, for Plaintiffs-Appellees.

CAITLIN HALLIGAN, First Deputy Solicitor General of the State of New York, New York, NY (Eliot Spitzer, Attorney General of the State of New York, Michael Belohavek, Deputy Solicitor General of the State of New York, on the brief, and Sachin Pandya, Assistant Solicitor General of the State of New York, of counsel), for Defendant-Appellant.

NATHAN LEWIN, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., Washington, D.C. (Alyza D.

Lewin, Noam B Fischman, on the brief, and Dennis Rapps, National Jewish Commission on Law and Public Affairs, New York, NY, of counsel), for Intervenors-Defendants-Appellants.

Miner, Circuit Judge.

The word "kosher" has been part of the vernacular for some time as a synonym for correct, genuine, or legitimate. *See 8 Oxford English Dictionary* 753 (1971). Its original meaning, however, lies in the centuries-old Jewish law of *kashrut,* the Hebrew noun from which "kosher" is derived. *Kashrut* encompasses the entire body of rules relating to foods that may be consumed as well as to the preparation of such foods. The Hebrew National company, a well- known purveyor of kosher hot dogs and other kosher food products, has long marketed its goods with the slogan, "[w]e answer to a higher authority." Hebrew National, http://www.hebrewnational.com/. In New York, the principal authority to which it answers is the State's Department of Agriculture and Markets, which is charged with the enforcement of the New York statutes prohibiting intentional fraud in the sale of kosher food. Whether those statutes are violative of the First Amendment command that "[the States] shall make no law respecting an establishment of religion," is the question before us on this appeal.

Defendant-appellant Rabbi Luzer Weiss, Director of the Kosher Law Enforcement Division of the New York State Department of Agriculture and Markets ("the Department"), and intervenors-defendants-appellants[1] appeal

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[1] Intervenors-defendants-appellants are the Honorable Sheldon Silver, Abe Alper, Jon Greenfield, Jack Lee, Rabbi

from a summary judgment entered in the United States District Court for the Eastern District of New York (Gershon, J.) declaring that New York Agriculture & Markets Law sections 201-a, 201-b(1), 201-c, 201-e (2-a) and (3-c), 201-f, 201-h, and 26-a ("the challenged laws") on their face violate the Establishment Clause of the First Amendment, and enjoining the Department from enforcing those provisions. The challenged laws are some of New York's statutory provisions aimed at preventing fraud in the kosher food industry. Plaintiffs-appellees are Commack Self-Service Kosher Meats, Inc., d/b/a Commack Kosher, an entity in Commack, Long Island engaged in the meat business, and its owners, Brian and Jeffrey Yarmeisch (collectively, "the Yarmeisches"). Over the last sixteen years, the Yarmeisches have been cited for violations of New York's kosher fraud laws on at least four occasions.

In January 1996, the Yarmeisches brought this action, claiming that the challenged laws violate the Establishment Clause of the First Amendment by defining "kosher" to mean food that is "prepared in accordance with the orthodox Hebrew religious requirements." *See, e.g.,* N.Y. Agric. & Mkts. Law § § 201-a(1), 201-b(1) (McKinney 1991). The Yarmeisches also asserted a free exercise claim in which they contended that the challenged laws deprive non-Orthodox Jewish consumers of kosher food products of their First Amendment right to the free exercise of religion. Additionally, the Yarmeisches claimed that the challenged

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Moshe Portnoy, Richard Schwartz, Agudath Harabonim of the United States and Canada, Agudath Israel of America, National Council of Young Israel, The Rabbinical Alliance of America, The Rabbinical Council of America, Torah Umesorah National Society of Hebrew Day Schools, and The Union of Orthodox Jewish Congregations of America (collectively, "the intervenors").

laws are unconstitutionally vague in violation of due process, and that, by reason of their irregular and arbitrary enforcement, they violate due process as applied. Lastly, the Yarmeisches sought to enjoin the Department from disseminating information concerning future violations of the challenged laws until after an alleged offender is prosecuted and found guilty. After both sides moved for summary judgment, the district court granted the Yarmeisches' motion, holding that the challenged laws on their face violate the Establishment Clause. The court found that (1) the challenged laws excessively entangle the state and religion because, in order to be enforced, the laws require the Department to refer to "orthodox Hebrew religious requirements," and (2) the laws have the impermissible effect of advancing Orthodox Judaism by requiring vendors of food products labeled "kosher" to conform to Orthodox kosher standards and thereby cause consumers of such products to purchase only products that are kosher under the Orthodox definition.

For the reasons that follow, we affirm.

BACKGROUND

I. The Facts

The Yarmeisches received their first civil citation for transgressing New York's kosher fraud laws[2] following an

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[2] The New York Agriculture and Markets Law provides both criminal and civil penalties for violations of the kosher fraud law provisions. A violation constitutes a class A misdemeanor unless the food has a retail value in excess of five thousand dollars, in which case the violation is classified as a class E felony. N.Y. Agric. & Mkts. Law § 201 d (McKinney 2001). Section 16(30) confers on the Department, and thus the commissioner,

inspection of their store by the Department on July 10, 1986. The Department's inspector, Max Goldgrab, seized for testing a package of veal spareribs that was labeled "soaked and salted."[3] The Department's analysis revealed that "selected surface tissues [of the spareribs] do not contain added salt" and thus that Commack Kosher was in violation of New York's kosher fraud laws. In a letter responding to the citation, the Yarmeisches claimed that Commack Kosher "has always soaked and salted all the meats that state that they are soaked and salted. If this does not meet with the Hebrew orthodox religious requirements we need to know

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the authority to investigate, inspect, and supervise the sale of meat and meat preparations at establishments that are subject to the kosher law provisions and to make rules and regulations necessary for enforcement of those provisions. *Id.* § 16(30). Section 39 sets forth generally the civil penalties that the Department may impose for violations of any section of the Agriculture and Markets Law, including the kosher fraud provisions. *Id.* § 39. The attorney general is authorized to bring a civil suit to recover any penalties assessed by the commissioner. *Id.* § 44.

[3] A detailed explication of the provisions challenged here is contained in Part I of the next section of this opinion. For now, it is sufficient to note that the heart of New York's kosher fraud statutes is the prohibition on the sale of food products falsely represented "to be kosher ... or as having been prepared under ... the orthodox Hebrew religious requirements." N.Y. Agric. & Mkts. Law § 201-a(1). One of these requirements is that, after slaughter, meat must be "koshered," through a procedure in which the meat is soaked and salted to draw out the blood. *See, e.g., Ran-Dav's County Kosher, Inc. v. State of New Jersey,* 129 N.J. 141, 147, 608 A.2d 1353 (1992).

what the analysis was and what the standards should be." Despite this assertion, the Yarmeisches did not formally challenge the violation and paid a civil penalty fine in the amount of $600.

The Department inspected Commack Kosher again on January 7, 1987, and found another violation of New York's kosher fraud laws. This time the Department seized "two ... packages of beef chuck side steaks," each of which was marked "soaked and salted." The Department's "laboratory analysis did not reveal a significantly greater salt content in the outside surface of the steak than in the inside." The Department asserted that "[h]ad the steak been properly soaked and salted[,] ... the analysis would have indicated that the outside surface of the steak ... had a measurably higher salt content than the inner part of the meat." The Department therefore concluded that "[t]he defendant's steak was not soaked and salted according to orthodox Hebrew religious requirements and was improperly offered for sale and represented as such." Accordingly, the Department alleged violations of New York Agriculture and Markets Law section 201-a(1), which prohibits the sale of any food product represented to be "kosher" that has not been prepared "in accordance with the orthodox Hebrew religious requirements," as well as section 201-c(1), which contains a similar prohibition. N.Y. Agric. & Mkts. Law § § 201-a(1), 201-c(1). The Yarmeisches responded to the claimed violations in a letter dated April 29, 1987, which contained the following explanation of their soaking and salting method:

> We take the side steak with the top and bottom fat left on the meat and soak it in water for one half hour, salt for one hour, and then rinse thoroughly. We then proceed to remove the fat and then face the meat (remove dark meat before packaging).

> This is the procedure for all meat that is labeled soaked and salted, all of which is done under the direction of Rabbi Berman who has been supervising this establishment for approximately five years.

Rabbi Berman is a rabbi who adheres to the teachings of the Conservative branch of Judaism. The Yarmeisches' letter further explained that they believed their procedures for soaking and salting were in accordance with kosher requirements and requested that the Department "explain how [any problem with their procedures] can be rectified." The Department did not directly respond to their inquiry, but instead filed a verified civil complaint against the Yarmeisches. Ultimately, the Yarmeisches paid a $300 civil penalty fine as punishment for the 1987 violation.

After a third inspection of Commack Kosher in April 1988, the Department quarantined lamb tongues on the ground that the tongues had not been properly soaked and salted. The specific allegation of wrongdoing was that the tongues were found soaking in a solution of salt water, which "is improper preparation [that] render[ed] the tongues irreversibly non "kosher" ". The Yarmeisches challenged the Department's decision, stating that the tongues were properly soaked and salted as certified by their supervising rabbi. The Department countered with a letter to the Yarmeisches claiming that, in any event, the tongues had not been properly deveined in accordance with Orthodox Hebrew requirements. The Yarmeisches state that this charge is still pending, while the Department says that it considers the case closed and, if any charges are still pending, it will have them dismissed.

The Department inspected Commack Kosher again on February 22, 1993. A month later, the Department

informed the Yarmeisches that by "offering for sale poultry as kosher without the required markings on labels 'soaked and salted' or 'not soaked and salted,' " the Yarmeisches had violated New York Agriculture and Markets Law section 201-a(2). The Department's letter directed the Yarmeisches to submit payment of a civil penalty in the amount of $11,100 within fifteen days to avoid the initiation of court proceedings against them. The Yarmeisches disputed the Department's allegations and claimed that, at the time of inspection, the poultry at issue had not been offered to the public for sale. The Department eventually withdrew the assessed violation.

II. Procedural History

On January 16, 1996, about three years after their last assessed violation, the Yarmeisches brought this action against the Department[4] in the United States District Court for the Eastern District of New York. They amended their complaint on April 15, 1996. The Yarmeisches claimed that by defining "kosher" to mean food that is "prepared in accordance with orthodox Hebrew religious requirements," New York's kosher fraud laws violate the Establishment Clause. The Yarmeisches also brought free exercise and equal protection claims based on the allegation that the challenged laws equate "kosher" with "orthodox Hebrew religious requirements." Additionally, the Yarmeisches claimed that the challenged laws are unconstitutionally vague in violation of due process because they fail to define

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[4] On December 9, 1996, Magistrate Judge E. Thomas Boyle granted the motion of the intervenors for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b)(2), provided that the Hon. Sheldon Silver be limited to intervention in his individual capacity.

"orthodox Hebrew religious requirements." Arguing that the challenged laws fail to provide for proper training of state inspectors with respect to koshering, therefore leading to "irregular, arbitrary and capricious ... inspection of kosher facilities by the Kosher Law Enforcement Division," the Yarmeisches claimed that, as applied, the challenged laws violate their due process rights. Finally, the Yarmeisches sought to enjoin the Department from disseminating information concerning future violations of the challenged laws to the public[5] until after an alleged offender is prosecuted and found guilty, because to do otherwise violates due process and causes irreparable harm.

On October 18, 1996, the Department sought by motion to have the district court abstain from resolving the Yarmeisches' claims pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). In its motion, the Department, in a contention abandoned on appeal, claimed that the meaning of "kosher" under the challenged laws was an unresolved issue of New York law, and thus that the court should refrain from ruling on the laws' constitutionality. In an opinion and order dated December 15, 1997, the district court denied the motion because "[t]he statutory provisions at issue in this case have been interpreted for decades as equating 'kosher' with 'prepared in accordance with orthodox Hebrew religious requirements.' " *Commack Self-Service Kosher Meats v. Rubin*, 986 F.Supp. 153, 156 (E.D.N.Y.1997). The court based its finding on numerous decisions of New York courts

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[5] Such publication is permitted by New York Agriculture & Markets Law section 201-j, which provides that after proper notification to the violator, certain information concerning the violation "shall be available to the public."

dating as far back as 1918. *See id.* (citing *People v. Atlas,* 183 A.D. 595, 597, 170 N.Y.S. 834 (1st Dep't 1918), *aff'd,* 230 N.Y. 629, 130 N.E. 921 (mem.) (1921) (noting that "kosher" in the then-existing kosher fraud laws was used "evidently in the ordinary sense in which it is used in the trade, which is to designate meat as having been prepared under ... the orthodox Hebrew requirements"), and *State v. Glassman,* 109 Misc.2d 1088, 1090, 441 N.Y.S.2d 346, 348 (County Ct.1981) ("The issue in this case is whether the defendants 'with intent to defraud' represented that their frankfurters and salami were Kosher when in fact [they were not because they were] not prepared in accordance with the Orthodox Hebrew religious requirements.")).

The Yarmeisches moved for preliminary injunctive relief on June 9, 1998. On June 18, 1998, the district court denied the motion, but the parties agreed on the record that the Yarmeisches would be notified of any alleged violations of the challenged laws prior to the release of that information to the public. After the completion of discovery, on March 1, 1999, the intervenors moved for summary judgment on the first six claims in the Yarmeisches' complaint, each of which attacked the challenged laws on their face. The Department moved for summary judgment on all the claims on June 7, 1999. Also on June 7, 1999, the Yarmeisches filed a cross-motion for summary judgment on all claims.

In an opinion and order dated July 28, 2000, the district court granted the Yarmeisches' motion and declared that "N.Y. Agric. & Mkts. Law §§ 201-a, 201-b(1), 201-c, 201-e(2 a) and (3-c), 201-f, 201-h and 26-a, on their face violate the Establishment Clause and are therefore unconstitutional." *Commack Self-Service Kosher Meats, Inc. v. Rubin,* 106 F.Supp.2d 445, 459 (E.D.N.Y.2000). The court began its analysis by explaining that New York's kosher fraud laws equate "kosher" with "prepared in

accordance with orthodox Hebrew religious requirements," rejecting for a second time the Department's contention that the laws are merely registration statutes that impose no definition of "kosher." *Id.* at 452. The court then turned to an evaluation of the challenged laws under the test outlined in *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). The court held the challenged laws unconstitutional because they create an excessive entanglement between the State and religion and impermissibly advance religion.

In the district court's view, the challenged laws create an excessive entanglement because enforcement of the laws requires reference to religious tenets not contained in the statute. *See Commack Self-Service,* 106 F.Supp.2d at 454-55, 457. The court did not find an excessive entanglement "simply because [the challenged laws] use a word of religious significance," but rather because "they require the sponsorship, financial support and active involvement of New York State in the daily monitoring of the compliance of vendors of kosher products with a set of religious dietary laws, which are incorporated by reference into the Challenged Laws." *Id.* at 454-55. Moreover, the court explained that "[e]ven where the Challenged Laws describe some specific procedures that must be followed before a product may properly be called kosher, the procedures refer back to orthodox Hebrew religious requirements; for example, meat 'shall be washed in accordance with orthodox Hebrew religious requirements ... by a duly ordained orthodox rabbi or by a person authorized by him.' N.Y. Agric. & Mkts. § 201-f." *Id.* at 455.

Additionally, the district court held that the challenged laws represent an impermissible state advancement of religion because (1) they require "state officials ... [to] enforc[e] a set of religious laws," *id.* at 458,

and (2) the incorporation of Orthodox kosher standards "creates an impermissible symbolic union of church and state," *id.* at 459 (internal quotation marks omitted). The district court therefore held that the challenged laws on their face violate the Establishment Clause and, accordingly, did not address the Yarmeisches' other claims. The district court's judgment was entered on July 31, 2000, declaring the challenged laws unconstitutional and permanently enjoining the Department from enforcing them. This appeal followed.

DISCUSSION

I. New York's Kosher Fraud Statutes

In 1915, the New York legislature added to a penal statute prohibiting false labeling, a provision that was designed "to prevent and punish fraud in the sale of [kosher] meats or [kosher] meat preparation." *Atlas,* 183 A.D. at 596, 170 N.Y.S. 834. New York's kosher fraud statutes presently are contained in Article 17 of the State's Agriculture and Markets Law entitled "Adulteration, Packing, and Branding of Food and Food Products." Article 17 includes a number of provisions relating to various food items. Section 199-a(1) of Article 17 generally prohibits the sale of "any article of food which is adulterated or misbranded." This case involves a constitutional challenge to the provisions of New York's kosher fraud laws that define "kosher" as "prepared in accordance with orthodox Hebrew religious requirements," mandate adherence to those requirements, or are integral to the State's enforcement of such requirements. Those provisions are sections 201-a, 201-b(1), 201-c, 201-e(2-a) and (3-c), 201-f, 201-h, and 26-a.

Section 201-a provides that:

> 1. A person who, with intent to defraud, sells ...

> any ... article of food ... and falsely represents the same to be kosher or kosher for Passover ... or as having been prepared under ... the orthodox Hebrew religious requirements ... is guilty of a class A misdemeanor, except that ... provided said meat or meat preparations in violation has a retail value in excess of five thousand dollars, [a person] is guilty of a class E felony....
>
> 2. All fresh meats, meat by-products, meat food products and poultry offered for sale at retail as kosher shall be marked on the label when packaged or by a sign when not packaged, with the words "soaked and salted" or "not soaked and salted" as the case may be. Such words when marked on the label or by a sign shall be in letters at least as large as the letters of the words on the label or sign designating such meat, meat by-products, meat food products and poultry as kosher.
>
> 3. Fresh meat, meat by-products, meat food products and poultry shall be defined as meat or poultry that has not been processed, except for salting and soaking.
>
> 4. Every person who sells or exposes for sale, at wholesale or retail, any kosher meat ... or poultry shall retain all records with respect to the origin of such kosher meat ... or poultry....

N.Y. Agric. & Mkts. Law § 201-a.

Section 201-b(1) is identical to section 201-a(1) except that it applies to the sale of food products in hotels and restaurants. Section 201-c, entitled "Fraudulent identification of food and food products," provides that no

person shall "[w]ilfully mark ... as kosher, or as kosher-style, or as having been prepared in accordance with the Hebrew orthodox religious requirements food or food products not kosher or not so prepared." *Id.* § 201-c(1). Section 201-c(2) prohibits the defacement or alteration of labels affixed to food products to indicate that they are "kosher or have been prepared in accordance with the Hebrew orthodox religious requirements." *Id.* § 201-c(2). Section 201-c(3) forbids the sale, possession, or disposal of (1) any food product without its original slaughterhouse label, or (2) any food product to which such label has been fraudulently affixed. *Id.* § 201-c(3).

Section 201-e(2 a) provides that "[i]n the event that non-prepackaged fresh meat or poultry is sold and delivered off-premises as Kosher the meat or poultry and the bill of sale, if any, rendered at the time of delivery shall have affixed to them a label or the printed words 'not soaked and salted' or 'soaked and salted' as the case may be." *Id.* § 201-e(2-a). Section 201-e(3-c) requires slaughterhouses that sell kosher food products to maintain records "regarding the time, place, date, person or organization supervising the slaughter of [an] animal and the number of animals slaughtered in accordance with orthodox Hebrew religious requirements." *Id.* § 201-e(3 c).

Section 201-f, captioned "Kosher meat or poultry," provides that:

> 1. All meat or poultry which is sold ... and is represented as having been prepared in accordance with orthodox Hebrew religious requirements and which has not been soaked and salted immediately after slaughter on the premises where slaughtered:
>
> (a) shall have affixed to it a tag or plumba

> stating the date and time of day ... of slaughter; and
>
> (b) shall be washed in accordance with orthodox Hebrew religious requirements within seventy-two hours after slaughter, and within each subsequent seventy- two hour period, by a duly ordained orthodox rabbi or by a person authorized by him....
>
> 2. No person shall sell, offer or expose for sale any meat or poultry which is represented as having been prepared in accordance with orthodox Hebrew religious requirements, unless such meat or poultry is in compliance with subdivision one of this section.
>
> 3. For purposes of this section:
>
> (a) [defining "meat"]
>
> (b) [exempting liver from 1(b)]
>
> 4. All kosher poultry in the form of the whole bird shall be tagged with a plumba identifying it as kosher. Whole birds shall be so tagged at the original slaughterhouse.
>
> 5. The commissioner shall promulgate rules and regulations as are necessary to implement the provisions of this section, including but not limited to, the type of kosher identification to be affixed to each of the parts of such meat and poultry.

Id. § 201-f.

Section 201-h prohibits the "label[ing of] food or food products with the words parve or pareve or in any way

... indicat[ing] that the food or food product may be used or consumed indiscriminately with meat, poultry or dairy products according to Orthodox-Hebrew requirements when such food or food products are impermissible for such use or consumption." *Id.* § 201-h.

Lastly, section 26-a establishes a nine-person advisory board on kosher law enforcement within the Department. The advisory board's members are appointed by the commissioner of the Department. The advisory board's role under the statute is

> to advise, counsel and confer with the commissioner on matters of policy in connection with the administration and enforcement of [the kosher fraud] laws ..., to consider all matters submitted to it by the commissioner, and on its own initiative to recommend to the commissioner such changes in the [kosher fraud] laws ... as may be deemed advisable ... and, with the consent of the commissioner, to submit for enactment by the legislature such draft or drafts of legislation imposing such further restrictions on the possession, sale and exposure for sale of kosher meats, meat preparations and food products, as may be deemed necessary.

Id. § 26-a(4).

The provisions outlined here are not all of New York's kosher fraud laws, but only those challenged by the Yarmeisches and held unconstitutional by the district court.[6]

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[6] For example, there are several provisions that require the identification or registration of the person or organization certifying a food product as kosher, *see, e.g.*, N.Y. Agric. & Mkts. Law § § 201-g, 201-e(3), and 201-i, as well as

II. The *Lemon* Test

As the Supreme Court has recently reiterated, in "cases involving facial challenges on Establishment Clause grounds, ... we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2135, 29 L.Ed.2d 745 (1971)." *Santa Fe Ind. Sch. Dist. v. Doe,* 530 U.S. 290, 314, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (internal quotation marks and citations omitted). The *Lemon* factors require that a challenged law (1) have a valid secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion. 403 U.S. at 612-13, 91 S.Ct. 2105. We treat the excessive entanglement prong as a part of our "inquiry into a statute's effect." *Agostini v. Felton,* 521 U.S. 203, 233, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). We find the challenged laws do not pass constitutional muster under the *Lemon* test because they have a primary effect that both advances and inhibits religion.[7]

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several provisions requiring that food products represented as kosher be labeled as such, *see, e.g., id.* § § 201-e(1) and (2). None of these provisions were challenged by the Yarmeisches and thus are not at issue on this appeal.

[7] Plaintiffs contend we should judge the constitutionality of these laws under the standard of strict scrutiny, as in *Larson v. Valente,* 456 U.S. 228, 246, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982), and defendants claim that, because this is a facial attack, we should apply the rule of *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), requiring the plaintiff to show that "no set of circumstances exists under which the [statute] would be valid." We need not answer either question

A. The Entanglement Factor

Here the entanglement of the State and religious authorities is extensive and contributes to a primarily religious effect. The Supreme Court has explained that the Framers understood the First Amendment's prohibition on laws "respecting an establishment of religion" to preclude government "sponsorship [of religion], financial support [for religion], [or the] active involvement of the sovereign in religious activity," *Walz v. Tax Commission,* 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Illinois ex rel. McCollum v. Bd. of Educ.,* 333 U.S. 203, 212, 68 S.Ct. 461, 92 L.Ed. 649 (1948).

It appears to us that the challenged laws excessively entangle government and religion because they (1) take sides in a religious matter, effectively discriminating in favor of the Orthodox Hebrew view of dietary requirements; (2) require the State to take an official position on religious doctrine; and (3) create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria.

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because we conclude for the reasons given that, as to both questions, the laws fail the test of constitutionality even using the assumptions that are most accommodating to the State.

The Department argues that the challenged laws do not excessively entangle the government with religion because "no one disputes the meaning of the term 'kosher.' " There is ample evidence in the record to support the opposite conclusion. In a guide to observance of Jewish dietary law, published by the United Synagogue Commission on Jewish Education, author Samuel H. Dresner notes that

> [o]ver the years and in varying locales, rabbinic authorities differed in their interpretations of specific laws [of *kashrut*].... To cite a famous example: Sephardic Jews eat rice and legumes on Passover, Ashkenazic Jews do not. Ashkenazic Jews, by and large, do not eat the hindquarters of beef; Sephardic Jews do.
>
> ....
>
> Some of the decisions [regarding the laws of *kashrut*] recorded [in this book] are not accepted by all authorities on Jewish law, notably decisions about wine, cheese, gelatin, swordfish and sturgeon. This is not a novel situation in the history of Jewish law. There have always been disagreements on various points.

Samuel H. Dresner, *The Jewish Dietary Laws* 55-56 (1982).

The New Jersey Supreme Court, in striking down its state's kosher fraud laws as violative of the Establishment Clause, also rejected the State of New Jersey's claim that there is a consensus among the branches of Judaism regarding the proper standards for the preparation and sale of kosher food products: "[T]here is considerable disagreement over what precepts or tenets truly represent the laws of kashrut. There are differences of opinion concerning the

application and interpretation of the laws of kashrut both within Orthodox Judaism and between Orthodox Judaism and other branches of Judaism." *Ran-Dav's County Kosher v. New Jersey*, 129 N.J. 141, 147, 608 A.2d 1353 (1992) (citing Herman Wouk, *This Is My God* (1959), reprinted in *The Life of Torah* 98-99 (Jacob Neusner ed.1974); Rabbi Hayim Halevy Donin, *To Be a Jew* 102-04, 112-19 (1972); Rabbi J. David Bleich, *Contemporary Halakic Problems* 84-92 (1977)). For example, Orthodox Jews of the Sephardic sect adhere to "glatt" kosher standards that are more stringent than those followed by other Orthodox Jews. Raphael Poliakoff, *What Is Glatt Kosher?*, Kashrus Newsletter, vol. 1, no. 5. As between different branches of Judaism, "Conservative and Orthodox rabbis differ sharply on many ... issues" such as the kosher status of wine, cheese, sturgeon, and swordfish. Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 Col. J.L. & Soc. Probls. 1, 8 (1992). It is also widely recognized that "the strain between all three denominations [Orthodox, Conservative, and Reform] has increased in recent years." *Id.*

We find it indisputable that there are differences of opinion within Judaism regarding the dietary requirements of *kashrut*. As a result, because the challenged laws interpret "kosher" as synonymous with the views of one branch, those of Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism. This it may not do. As the Supreme Court has stated: "Whatever else the Establishment Clause may mean[,] ... it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed." *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 605, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). *See also Larson*, 456 U.S. at 244, 102 S.Ct. 1673 ("The clearest command of the Establishment Clause is that one religious

denomination cannot be officially preferred over another."); *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) ("[Government] may not aid, foster, or promote one religion or religious theory against another."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (noting that the Establishment Clause prohibits passage of laws that "aid one religion, aid all religions, or prefer one religion over another"). Thus, we find that the challenged laws' preference for the views of one branch of Judaism excessively entangles the State with religion in violation of the Establishment Clause.

The challenged laws also excessively entangle the State with religion because they require New York to adopt an official State position on a point of religious doctrine. The Department argues that this is not so for two reasons. First, the Department claims that the challenged laws "merely incorporate established trade standards that require the State to verify objective physical characteristics of food and whether food has been prepared or handled in certain ways." Second, the Department asserts that the "intent to defraud" requirement of the challenged laws eliminates the possibility that it will need to refer to religious authorities in enforcement proceedings. Because "the Department focuses primarily on ascertaining a vendor's basis for his or her good faith belief that the product being offered for sale is kosher," there is no "need [for the Department] to independently determine whether a product complies with kosher trade standards." We are unpersuaded by these contentions.

In order to assert that a food article does not conform to kosher requirements, New York must take an official position as to what are the kosher requirements. In doing so, the Department must either interpret religious doctrine or defer to the interpretations of religious officials in reaching its official position. The State thus impermissibly "weigh[s]

the significance and the meaning of disputed religious doctrine," *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church,* 393 U.S. 440, 452, 89 S.Ct. 601, 21 L.Ed.2d 658 (1969) (Harlan, J., concurring), or "employ[s] religious organizations as an arm of the civil [government] to perform the function of interpreting and applying state standards," *id.* at 451, 89 S.Ct. 601.

To illustrate, in response to their third citation, the Yarmeisches filed a demand for a bill of particulars, requesting that the State set forth in detail certain Orthodox Hebrew religious requirements for kosher food preparation. In order to respond to this demand, State officials corresponded with various Department officials seeking information regarding the proper koshering requirements. For example, a letter sent by Earl S. Roberts, Assistant Attorney General, to Michael McCormick, Assistant Counsel for the Department, requested assistance in responding to the Yarmeisches' demand and instructed McCormick that "[t]he [b]ill [of particulars] should describe briefly each requirement of the kosherizing, i.e. deveining, soaking, salting, and rinsing and identify the code of Jewish Law (Shulhan Aruch) by the tractate and sections which set forth these requirements in full detail."

Another letter, from Aaron Levine, a kosher food inspector with the Department, to Joan A. Kehoe, Counsel for the Department, set forth the relevant sections and chapters of Yoreh Deah, a book of Jewish laws, corresponding to the Yarmeisches' requests for more information regarding the kosher violations alleged against them in the verified complaint. Additionally, there are letters from Rabbi Rubin, an Orthodox rabbi who was then Director of the Division of Kosher Law Enforcement, clarifying various points raised by the Yarmeisches' demand. For example, one letter from Rabbi Rubin to Kehoe explains that

"[i]f members of the legal community, whether in Agriculture or the Attorney General's office, want us to trace the origin of (halacha) Jewish law, they should re-phrase their question and ask where in the [16th century] codes of Jewish law is a particular law found," rather than earlier biblical or Talmudic sources.

The draft bill of particulars[8] prepared by New York State in response to the Yarmeisches' request contains the following:

> 1) Veins that contain forbidden blood have to be removed [as] indicated in Section 65, chapter 1 through 5, referred to as laws for removing veins of forbidden blood (Yore Dayah) located in Shulhan Aruch.
>
> 1b) Law of soaking and salting are in Shulhan Aruch (Yore Dayah chapter 1 through 21).
>
> ....
>
> 3a) One blood vein on either side of a tongue has to be removed and the tip of a tongue has to be removed.

The Yarmeisches demand for a bill of particulars merely made more obvious a fact that would have been true even without the demand for a bill of particulars. The State authorities could not make a determination that the Yarmeisches' meat did not conform to kosher requirements without first having arrived at an official position on what the kosher requirements are. To do so excessively entangles the State with religion. *See Presbyterian Church,* 393 U.S.

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[8] The record on appeal does not make clear whether a final bill of particulars was delivered.

at 451-52, 89 S.Ct. 601.

We also find that the challenged laws fail the excessive entanglement inquiry because they run afoul of "the core rationale underlying the Establishment Clause[, which] is preventing 'a fusion of governmental and religious functions.' " *Larkin,* 459 U.S. at 126, 103 S.Ct. 505 (quoting *School District of Abington Township v. Schempp,* 374 U.S. 203, 222, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)). This prohibition is violated not only by the requirement that the State adopt an official position on a matter of religious doctrine, but also by the existence and activities of the Advisory Board.

Section 26-a of the Agriculture and Markets Law establishes an "advisory board on kosher law enforcement" that is required by statute "to advise, counsel and confer" with the Department commissioner on "matters of policy in connection with the administration and enforcement" of the kosher fraud laws, "and on its own initiative to recommend to the commissioner such changes in the [kosher fraud] laws or rules[,] ... and with the consent of the commissioner, to submit for enactment by the legislature such ... legislation ... as may be deemed necessary." N.Y. Agric.& Mkts. Law § 26-a(4).

The Department argues that the existence and activities of the Advisory Board do not conflict with the Establishment Clause because there is "a complete absence of any Board involvement in enforcement activities." The Board is granted extremely broad powers "to advise, counsel, and confer" with the Department commissioner on policy matters related to enforcement issues and even to draft and submit proposed legislation. We therefore do not find to be wholly accurate the Department's contention that there is a "complete absence" of Board involvement with enforcement

of the challenged laws. Although members of the Board do not directly participate in enforcement activities such as the actual inspection of kosher food establishments, issuance of citations, or pursuit of court action against alleged violators, we decline to take such a narrow view of the Board's involvement with enforcement of the challenged laws. To conclude otherwise, would be to exalt form over substance in light of the broad powers granted to the Board that substantially affect enforcement of the challenged laws.

While we acknowledge that "some limited and incidental entanglement between church and state authority is inevitable in a complex modern society," *Larkin*, 459 U.S. at 123, 103 S.Ct. 505, "[w]here 'fusion' [of governmental and religious authority] is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Grumet*, 512 U.S. at 699, 114 S.Ct. 2481. In our case, the Board's purpose--to advise the Department regarding the requirements of Orthodox Jewish dietary laws--and the fact that, of the six rabbis on the Board, all are Orthodox, convince us that New York's delegation of authority to the Board was made on the basis of religion and not "on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Id.* at 699, 114 S.Ct. 2481.

We find it insignificant that section 26-a does not require that Board members be rabbis or even Orthodox Jews. Instead, we agree with the Fourth Circuit that

> even if membership [o]n the [Advisory Board] were not restricted to adherents of Orthodox Judaism, or even if there were no [Advisory Board] at all, [the

> laws'] adoption of the Orthodox rules inevitably requires the intimate involvement of members of that faith, and the leaders of that faith, in discerning the applicable standard.

Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1343-44 (4th Cir.1995). By creating a regime in which there is a combined exercise of civic and religious authority, the challenged laws violate the fundamental principle underlying the Establishment Clause, which is "to prevent, as far as possible, the intrusion of either [government or religion] into the precincts of the other." *Lemon,* 403 U.S. at 614, 91 S.Ct. 2105.

We also note that one provision of the challenged laws, section 201- f(1)(b), represents an extraordinary entanglement of government and religion. Section 201-f requires that meat represented as "having been prepared in accordance with orthodox Hebrew religious requirements," but not immediately soaked and salted after slaughtering, must be properly washed "by a duly ordained *orthodox* rabbi or by a person authorized by him." N.Y. Agric. & Mkts. Law § 201-f (emphasis added). That provision, therefore, compels a kosher food vendor to employ a rabbi of a particular branch of Judaism in certain circumstances. The Department conceded at oral argument on this appeal that this provision cannot withstand constitutional attack, but contends that we should sever this requirement from the remaining provisions, which are themselves constitutional. We decline to do so because we find this particular provision indicative of the many ways in which the challenged laws excessively entangle the State with religion.

For all these reasons, we find that the challenged laws excessively entangle the State of New York and religion, and therefore run afoul of the Establishment Clause.

B. The Advancement of Religion Factor

We also find that the challenged laws fail the second prong of the *Lemon* test, which mandates that, to avoid conflict with the Establishment Clause, a principal or primary effect of a challenged law must neither advance nor inhibit religion. 403 U.S. at 612, 91 S.Ct. 2105. The challenged laws violate this prohibition because they (1) have a primary effect that both advances religion, by preferring the dietary restrictions of Orthodox Judaism over those of other branches, and inhibits religion, by effectively prohibiting other branches from using the kosher label in accordance with their religious beliefs, and (2) create an impermissible joint exercise of religious and civic authority that advances religion. We reach this conclusion for reasons similar to those that demonstrate excessive entanglement of government and religion.

First, as discussed above, the challenged laws discriminate in favor of the Orthodox view regarding the dietary requirements of *kashrut*. Through these laws, the State has selected the views of one branch of Judaism, thereby placing its imprimatur on the religious views of the one to the exclusion of others. Moreover, the use of the State's enforcement authority to prevent labeling of food products that do not meet Orthodox Hebrew religious requirements as kosher confers a substantial benefit on Orthodox Jews and not on others. We find that this constitutes an impermissible advancement of religion in violation of the Establishment Clause.

The challenged laws are significantly different in both kind and degree from those laws the Supreme Court has held merely have an "indirect, remote, or incidental benefit upon religion," *Lynch*, 465 U.S. at 683, 104 S.Ct. 1355

(internal punctuation omitted), and therefore do not advance religion. For example, in *Lynch,* the Court held that the inclusion of a creche within a Christmas holiday display comprised of many figures and decorations traditionally associated with Christmas did not confer a substantial and impermissible benefit on religion in general or on Christianity in particular because its "reason or effect merely happens to coincide or harmonize with the tenets of some ... religions." *Id.* at 682, 104 S.Ct. 1355 (quoting *McGowan v. Maryland,* 366 U.S. 420, 442, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961)). The Court reached the same conclusion regarding legislative prayers in *Marsh v. Chambers,* 463 U.S. 783, 792, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), and Sunday closing laws in *McGowan,* 366 U.S. 420, 81 S.Ct. 1101. None of the governmental actions challenged in those cases, however, involved the preference by government of one interpretation of sacred text over others.

Moreover, unlike the governmental actions at issue in the above-cited cases, the kosher fraud laws also inhibit religion. This is so because, by defining "kosher" as synonymous with the views of only Orthodox Judaism, the State prohibits members of other branches of Judaism from using the kosher label in accordance with the dictates of their religious beliefs where their dietary requirements differ from those of Orthodox Judaism. As a result, kosher food vendors can only comply with the law, and thus avoid the risk of civil and criminal sanctions, when they accept a meaning of kosher as defined by religious views that are not their own. We find this to be an impermissible inhibition of religion.

Second, the fusion of governmental and religious authority discussed in relation to the excessive entanglement inquiry--State reliance on religious authorities and the establishment and activities of the Advisory Board--creates a "joint exercise of ... authority [that] provides a significant

symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin*, 459 U.S. at 125-26, 103 S.Ct. 505. The Supreme Court has held that even the mere appearance of such joint exercise "can be seen as having a 'primary' and 'principle' effect of advancing religion." *Id.* at 126, 103 S.Ct. 505. Here, the challenged laws, as described earlier, produce an *actual* joint exercise of governmental and religious authority. United exercises of authority of this kind are prohibited by the Establishment Clause because of the danger that the government's action will be "perceived by [some] as an endorsement of their religious choices, or by [others] as a disapproval of their own." *Grumet*, 512 U.S. at 695, 114 S.Ct. 2481 (internal quotation marks omitted). Thus, by defining kosher according to the Orthodox view, the challenged laws "symbolically plac[e] the government's official seal of approval on one religious view." *Marsh*, 463 U.S. at 792, 103 S.Ct. 3330 (internal quotation marks omitted).

For these reasons, we find that New York's kosher fraud laws at issue in this case both impermissibly advance and impermissibly inhibit religion in violation of the Establishment Clause.

C. The Secular Purpose Factor

Finally, because the secular purpose prong of the *Lemon* test is often easily satisfied, and is uncontested by the parties here, we address it last. This prong rarely presents the greatest obstacle for laws attacked on Establishment Clause grounds because governmental action will only be found to lack a secular purpose where "there [is] no question that the statute or activity was motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680, 104 S.Ct. 1355. The parties here do not dispute that the challenged laws were enacted for the secular purpose of protecting consumers from

fraud in the kosher food market.

We agree with the New Jersey Supreme Court that a state has "a valid interest in preventing fraud in the sale of any foods, including kosher foods." *Ran- Dav's,* 129 N.J. at 167, 608 A.2d 1353. This interest in protecting against fraud in the kosher food market extends to the general public. Indeed, Jewish consumers reportedly now make up less than thirty percent of the consumers of kosher food. *See* Frank Bruni, *The Brave New World of Kosher; Foods Exert a Growing Appeal That Isn't Just for Jews,* N.Y. Times, Nov. 15, 1996, at B1. The remainder are Muslims and others with similar religious requirements, persons with special dietary restrictions, and those who simply prefer food bearing the kosher label as a symbol of purity. The State clearly has a valid secular interest in protecting from fraud all those who choose to consume kosher food products. We do note, however, that the challenged laws imperfectly accomplish this secular purpose because their avowed purpose is amply covered by the existing general fraud laws. *Cf. Larkin,* 459 U.S. at 124, 103 S.Ct. 505 ("[T]hese valid secular objectives can be readily accomplished by other means."). For example, section 199-a(1) prohibits any misbranding of food, and therefore would penalize vendors who falsely represented their products to be kosher according to the standard described on the label. In other words, under the general statutory scheme governing fraud in the food industry, the State "can prevent fraud in the sale of kosher food in a less restrictive and neutral manner by simply requiring that any vendor engaged in the sale of kosher food state the basis on which the food is labeled kosher." *Barghout,* 66 F.3d at 1346 n. 15. Thus, the valid secular purpose articulated by the State can be accomplished by nondiscriminatory means that do not advance religion.

In sum, we find the New York kosher fraud laws

challenged here unconstitutional on their face. Even assuming the challenged laws were enacted for a valid secular purpose, they violate the Establishment Clause by fostering excessive State entanglement with religion and by producing a primary effect that both advances and inhibits religion. Because we find the challenged laws unconstitutional on their face, we need not address the Yarmeisches' remaining arguments.

CONCLUSION

In accordance with the foregoing, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 1st day of August two thousand two.

Commack Self-Service, et al.,

Plaintiffs-Appellees,

v.

Dkt Nos: 00-9116(L),
00-9118(CON)

Weiss,

Defendant-Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Intervenors-Defendants-Appellants Silver, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has

been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By:_____
Arthur M. Heller
Administrative Attorney

APPENDIX C

United States District Court,
E.D. New York.

COMMACK SELF-SERVICE KOSHER MEATS, INC., d/b/a Commack Kosher, Brian Yarmeisch and Jeffrey Yarmeisch, Plaintiffs,
v.
Rabbi Schulem RUBIN, as Director of the Kosher Law Enforcement Division of the New York State Department of Agriculture and Markets, Defendant,
and
Hon. Sheldon Silver, the Union of Orthodox Jewish Congregations of America, Abe Alper, Jon Greenfield, Jack Lee, Rabbi Moshe Portnoy, Richard Schwartz, Agudath Harabonim of the United States and Canada, Agudath Israel of America, National Council of Young Israel, Rabbinical Alliance of America, Rabbinical Council of America, Torah Umesorah National Society of Hebrew Day Schools, Union of Orthodox Jewish Congregations of America, Defendants-Intervenors.

No. 96 CV 179.

July 28, 2000.

Opinion and Order

GERSHON, District Judge.

Plaintiffs, Long Island merchants servicing

consumers of kosher food products, challenge the constitutionality, under both the United States and New York State Constitutions, of certain of the New York State laws aimed at protecting consumers of food products labeled "kosher" from fraud. The named defendant is the Director of the Kosher Law Enforcement Division of the New York State Department of Agriculture and Markets (the "Department").[9] In December 1996, several Orthodox Jewish organizations, a rabbi, a competitor of plaintiffs, and individual consumers of kosher products were permitted to intervene jointly as defendants pursuant to Federal Rule of Civil Procedure 24(b)(2). Discovery has been completed.

Plaintiffs claim that the statutes described below (the "Challenged Laws") violate both the Establishment and Free Exercise Clauses of the First Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Defendant and the intervenors seek summary judgment dismissing the first six counts of the complaint, which challenge the laws on their face. Plaintiffs seek summary judgment on all claims, including count seven, which challenges the laws as applied.

The Challenged Laws

Section 201-a(1) of the New York Agriculture and Markets Law provides that:

> 1. A person who, with intent to defraud, sells ... any ... article of food ... and falsely represents the same to be kosher or kosher for Passover, whether such ... article of food ... be raw or prepared for human consumption, or as

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[9] Rabbi Rubin has since been replaced by Rabbi Luzer Weiss as Director of the Kosher Law Enforcement Division.

having been prepared under, and of a product or products sanctioned by, the orthodox Hebrew religious requirements, either by direct statement orally, or in writing, which might reasonably be calculated to deceive or lead a reasonable man to believe that a representation is being made that such food is kosher or prepared in accordance with the orthodox Hebrew religious requirements ... is guilty of a class A misdemeanor, except that ... provided said meat or meat preparation in violation has a retail value in excess of five thousand dollars, [a person] is guilty of a class E felony....

2. All fresh meats, meat by-products, meat food products and poultry offered for sale at retail as kosher shall be marked on the label when packaged or by a sign when not packaged, with the words "soaked and salted" or "not soaked and salted" as the case may be. Such words when marked on the label or by a sign shall be in letters at least as large as the letters of the words on the label or sign designating such meat, meat by-products, meat food products and poultry as kosher.

3. Fresh meat, meat by-products, meat food products and poultry shall be defined as meat or poultry that has not been processed, except for salting and soaking.

4. Every person who sells or exposes for sale, at wholesale or retail, any kosher meat ... or poultry shall retail all records with respect to the origin of such kosher meat ... or poultry....

Section 201-b(1) parallels the provisions of Section 201-a except that it applies specifically to the sale of food

products in hotels and restaurants. Section 201-c, entitled "Fraudulent identification of food and food products," provides that no person shall "[w]ilfully mark ... as kosher, or as kosher-style, or as having been prepared in accordance with the Hebrew orthodox religious requirements food or food products not kosher or not so prepared ...."

Section 201-e(2-a) provides that "[i]n the event that non-prepackaged fresh meat or poultry is sold and delivered off-premises as Kosher the meat or poultry and the bill of sale, if any, rendered at the time of delivery shall have affixed to them a label or the printed words 'not soaked and salted' or 'soaked and salted' as the case may be," and Section 201-e(3-c) provides that "[a]ny person or firm owning or operating a slaughterhouse which produces meat or poultry which is offered as kosher in this state shall keep records with respect thereto, subject to inspection by the department, regarding the time, place, date, person or organization supervising the slaughter of the animal and the number of animals slaughtered in accordance with orthodox Hebrew religious requirements...."

Section 201-f, which bears the caption "Kosher meat or poultry," provides that:

> 1. All meat or poultry which is sold ... and is represented as having been prepared in accordance with orthodox Hebrew religious requirements and which has not been soaked and salted immediately after slaughter on the premises where slaughtered:
> (a) shall have affixed to it a tag or plumba stating the date and time of day ... of slaughter; and
> (b) shall be washed in accordance with orthodox Hebrew religious requirements

within seventy-two hours after slaughter, and within each subsequent seventy- two hour period, by a duly ordained orthodox rabbi or by a person authorized by him....
2. No person shall sell, offer, or expose for sale any meat or poultry which is represented as having been prepared in accordance with orthodox Hebrew religious requirements, unless such meat or poultry is in compliance with subdivision one of this section.
3. For purposes of this section:
(a) [defining "meat"]
(b) [exempting liver from 1(b)]
4. All kosher poultry in the form of the whole bird shall be tagged with a plumba identifying it as kosher. Whole birds shall be so tagged at the original slaughterhouse.
5. The commissioner shall promulgate rules and regulations as are necessary to implement the provisions of this section, including but not limited to, the type of kosher identification to be affixed to each of the parts of such meat and poultry.

Section 201-h provides that "[i]t shall be unlawful to label food or food products with the words parve or pareve or in any way to indicate that the food or food product may be used or consumed indiscriminately with meat, poultry or dairy products according to Orthodox-Hebrew requirements when such food or food products are impermissible for such use or consumption."

Finally, Section 26-a establishes a nine-person advisory board appointed by the Commissioner of the Department of Agriculture and Markets to counsel the Commissioner on policy matters, to confer and discuss

regulations regarding the preparation of kosher foods, and to propose amendments to the Kosher Laws for adoption by the legislature. The statute provides as follows:

> It shall be the duty of the advisory board hereby established to advise, counsel and confer with the commissioner on matters of policy in connection with the administration and enforcement of laws and rules relating to kosher meats, meat preparations, and food products, to consider all matters submitted to it by the commissioner, and on its own initiative to recommend to the commissioner such changes in the laws or rules relating to the possession, sale and exposure for sale of kosher meats, meat preparations, and food products, as may be deemed advisable to secure the effective administration and enforcement of such laws and rules and, with the consent of the commissioner, to submit for enactment by the legislature such draft or drafts of legislation imposing such further restrictions on the possession, sale and exposure for sale of kosher meats, meat preparations and food products, as may be deemed necessary.

N.Y. Agric. & Mkts. Law § 26-a(4).[10]

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[10] Although plaintiffs sometimes refer to the laws they challenge as N.Y. Agric. & Mkts. Law § § 201-a *et seq.*, the amended complaint, briefs and oral argument indicate that they are challenging on their face only the laws identified in the text, namely, those laws which, as described *infra* at pp. 450-51, define kosher as prepared in accordance with orthodox Hebrew religious requirements, require

The Challenged Laws are contained in a separate section of New York's laws regarding adulteration and mislabeling of food products and are additional to N.Y. Agric. & Mkts. § 201, entitled "Misbranding of food," which provides that "food shall be deemed to be misbranded ... if its labeling is false or misleading in any particular."

Section 201-d provides that violations of the Challenged Laws shall be a class A misdemeanor, except that a person who with intent to defraud sells meat with a retail value of more than five thousand dollars, that is falsely represented to be kosher, is guilty of a class E felony.

Background

Except as otherwise indicated, the following facts are undisputed.

Plaintiffs Brian and Jeffrey Yarmeisch are butchers in Commack, Long Island. Plaintiffs, along with Evelyn Yarmeisch, run a butcher shop known as Commack Self-Service Kosher Meats, Inc., also known as Commack

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adherence to those requirements, or are integral to the State's enforcement of such requirements. Plaintiffs include within their challenge the statutes referring to meat or poultry being "soaked and salted," a term which is not defined in the statutes and refers to religious requirements of food preparation. That is, plaintiffs do not challenge those laws which merely require the identification or registration of the person or organization certifying a food product as kosher, *see, e.g.*, N.Y. Agric. & Mkts. Law § 201-g and § 201-e(3), or N.Y. Agric. & Mkts. Law § 201-i, which authorizes certifying persons to file with the department a statement of the person's qualifications.

Kosher, which is itself named as a plaintiff. Plaintiffs describe themselves as "Jewish," but "not observant in accordance with the tenets of Orthodox Judaism." Plaintiffs also state that their butcher shop, Commack Kosher, has "at the times relevant hereto" had "kosher supervision ... under the auspices of a duly ordained rabbi of the Jewish faith."

Plaintiffs have received citations from the New York State Department of Agriculture and Markets for numerous violations of the Kosher Laws. The most recent offense is alleged to have occurred in February 1993, when Inspector P. Schnell cited plaintiffs for attempting to sell as kosher poultry that did not bear the proper labeling. Plaintiffs disputed the report and claimed that, at the time of the inspection, the poultry at issue had not been offered to the public for sale. Plaintiffs further asserted that eighteen of the nineteen packages referred to in Inspector Schnell's report had not been removed from the boxes in which they were originally delivered and that each box contained a label indicating that the poultry "was kosher in accordance with the supervisory standards of the Union of Orthodox Congregations." The assessed violation was eventually withdrawn by the Department.

Plaintiffs received similar citations in July 1986, January 1987 and April 1988. In July 1986, plaintiffs were cited for failing to "soak and salt" veal spare ribs. Plaintiffs were sent a notice of violation, stating that the Department had found a package of veal spare ribs which were not "soaked and salted as mandated by Hebrew orthodox religious requirements." Plaintiffs informed the Department that its "store has always soaked and salted all the meats that state that they are soaked and salted." Plaintiffs wrote to the Department that "if this does not meet with the Hebrew orthodox religious requirements, we need to know what the analysis was and what the standards should be." However,

they opted not to challenge the violation and paid a fine. The following year, plaintiffs were again cited for possession of an unsalted product--side steaks. Plaintiffs were notified that they were in violation of law for failure to salt the side steaks "as mandated by Hebrew orthodox religious requirements." Plaintiffs sent the Department a letter dated April 29, 1987, stating that they were processing the meat in a manner satisfactory to their supervising rabbi and requesting direction from the State as to the State's interpretation of proper koshering procedures. The Department did not respond to plaintiffs' request but instead issued a complaint against plaintiffs, stating that plaintiffs had failed to kosher their meat "in accordance with orthodox Hebrew religious requirements." The Department found that "Defendant [Commack Kosher] presented to the consumer public that only kosher food, prepared in accordance with orthodox Hebrew religious requirements, was sold on its premises." Plaintiffs deny that they ever made any representation that they sold food koshered "in accordance with orthodox Hebrew requirements," but rather simply represented that their food products were "kosher." Plaintiffs state that they resolved this dispute by agreeing to pay a fine. Defendant does not contradict plaintiff's evidence, but states that the Department has no records of the 1986 and 1987 citations.

In April 1988, the Department quarantined lamb tongues which it found within the plaintiffs' establishment, on the ground that the tongues had not been properly soaked and salted. Plaintiffs challenged the Department's decision, stating that the tongues were properly soaked and salted as certified by their supervising rabbi. The Department countered in a letter to the plaintiffs stating that, in any case, the tongues had not been properly deveined. Plaintiffs state that this charge is still pending, while defendant says that it considers the case closed and, if any charges are still pending, it will have them dismissed.

Plaintiffs' Claims

Plaintiffs claim that the Challenged Laws define food that is "kosher" as food that is "prepared in accordance with orthodox Hebrew religious requirements" and in so doing they violate the Establishment Clause of the First Amendment of the United States Constitution. Plaintiffs also claim that equating "kosher" with "orthodox Hebrew religious requirements" deprives Jewish consumers who do not follow Orthodox Judaism of their First Amendment right to the free exercise of religion and of their Fourteenth Amendment right to the equal protection of the laws. Plaintiffs further claim that the Challenged Laws are unconstitutionally vague in violation of due process because they fail to define "orthodox Hebrew religious requirements." Arguing that the Challenged Laws fail to provide for proper training of state inspectors with respect to koshering, therefore leading to "irregular, arbitrary and capricious ... inspection of kosher facilities by the Kosher Law Enforcement Division," plaintiffs' claim that, as applied, the Challenged Laws violate their due process rights. Finally, plaintiffs seek to enjoin the Department from disseminating information concerning future violations of the Kosher Laws to the public under Section 201-j of the Kosher Laws, until after the alleged offender is found to be guilty, because, given the alleged arbitrary and uninformed manner in which the Challenged Laws are enforced, to do otherwise would violate the plaintiffs' due process rights and irreparably damage them.

In addition to the above-described facts as to the prosecution of plaintiffs under the Challenged Laws, the parties have submitted voluminous factual material on a variety of subjects, including the way in which the Department enforces the statute; the meaning of the word

kosher and the degree of agreement by consumers of kosher food products as to its meaning; and the activities of the statutorily-created Kosher Law Advisory Board. As will be seen, there are no genuine issues of material fact which prevent the court from resolving plaintiffs' facial challenge: Since the New York state courts have authoritatively interpreted the Challenged Laws, the Department cannot avoid an Establishment Clause challenge by claiming that it currently enforces the statute otherwise; on the Department's and the intervenors' own views on the issue of the meaning of the word kosher and its understanding among consumers, a violation of the Establishment Clause is present; and plaintiffs have established their right to relief, without considering their claims of improprieties by the Kosher Law Advisory Board.

Procedural History

Plaintiffs filed their complaint on January 16, 1996, and their amended complaint on April 15, 1996. On December 9, 1996, Magistrate Judge E. Thomas Boyle granted the intervenors' motion for permissive intervention pursuant to Fed.R.Civ.P. 24(b)(2), provided that the Hon. Sheldon Silver, Speaker of the State Assembly, be limited to intervention in his individual capacity. 170 F.R.D. 93. Plaintiff's application for a preliminary injunction was denied on the record on June 18, 1998, but agreement was reached on the record that plaintiff would be notified by defendant of any alleged violations of law prior to the release of that information for publication.

By my order of December 15, 1997, defendant's motion for abstention under the doctrine of *Railroad Commission of Texas v. Pullman,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), was denied. 986 F.Supp. 153. In that ruling, the history of the interpretation of the word

"kosher" in New York's Kosher Laws was described as follows:

> The statutory provisions at issue in this case have been interpreted for decades as equating "kosher" with "prepared in accordance with orthodox Hebrew religious requirements." As early as 1918, in *People v. Atlas,* 183 A.D. 595, 170 N.Y.S. 834 (1st Dept.1918), *aff'd without opinion,* 230 N.Y. 629, 130 N.E. 921 (1921), the New York Appellate Division, interpreting provisions of a predecessor statute that are substantially similar to those now challenged by plaintiffs, concluded that the Kosher Laws define "kosher" as "prepared in accordance with orthodox. Hebrew religious requirements...." *Id.* at 183 A.D. 595, 170 N.Y.S. 834.
>
> Later cases, interpreting successor statutes containing the same basic provisions as those interpreted in *Atlas,* have likewise treated the Kosher Laws as defining "kosher" to be "prepared in accordance with orthodox Hebrew religious requirements." *See, e.g., People v. Gordon,* 258 A.D. 421, 16 N.Y.S.2d 833, (2d Dept.1940), *aff'd without opinion,* 283 N.Y. 705, 28 N.E.2d 717 (1940); *State v. Glassman,* 109 Misc.2d 1088, 441 N.Y.S.2d 346 (N.Y.Co.Ct.1981) ("The issue in this case is whether the defendants 'with intent to defraud' represented that their frank furters and salami were Kosher when in fact [they were not because they were] not prepared in accordance with the Orthodox Hebrew religious requirements."); *People v. Johnson*

Kosher Meat Products, Inc., 42 Misc.2d 534, 248 N.Y.S.2d 429, 429 (N.Y.City Civ.Ct.1964) ("Upon failure at the trial to adduce any evidence that the meat sold as kosher was not prepared wholly in accordance with Hebrew orthodox religious requirements, the charges of fraudulent misrepresentation under Section 201-a were dismissed.")

This settled interpretation of the New York Kosher Laws has also been recognized by the courts of other states. *See, e.g., Erlich v. Municipal Court of the Beverly Hills Judicial District,* 55 Cal.2d 553, 557-58, 11 Cal.Rptr. 758, 360 P.2d 334 (Cal.1961) (addressing California statute with "substantially the language of the New York [Kosher Laws]," and giving that statute "the same construction as that given to the New York statutes by the courts of New York," namely, that "kosher" means " 'having been prepared under ... the orthodox Hebrew religious requirements' "). And, in an amicus brief submitted to the Supreme Court of New Jersey in *Ran-Dav's County Kosher, Inc. v. State,* 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied,* 507 U.S. 952, 113 S.Ct. 1366, 122 L.Ed.2d 744 (1993), a recent case holding the New Jersey Kosher regulations unconstitutional on grounds similar to those pressed here, the former Attorney General of the State of New York stated that the New York Kosher Laws "define kosher in terms of orthodox Jewish requirements." Brief of Amicus Curiae Robert Abrams, Attorney General of the State of New York at 16, Exh. F. to Memorandum

of Defendant-Intervenors.

The opinion went on to note that:

> Defendant now disavows this interpretation of the Kosher Laws and urges that the statute "does not impose a definition of the ter[m] 'kosher' " and thus avoids plaintiffs' constitutional challenges. Ignoring the body of law interpreting the statutory provisions of which plaintiffs complain, defendant argues that, rather than defining "kosher," those provisions merely require that merchants representing their products as either "kosher" or "in accordance with orthodox Hebrew religious requirements" provide sufficient information to allow a consumer to determine for himself or herself whether the entity or individual supervising the preparation of the products in question applies standards that are consistent with the consumer's individual religious beliefs.

Id. at 156-157.

In the following language, I rejected defendant's argument that the Kosher Laws are essentially registration statutes, requiring only the provision of background information to consumers and imposing no definition of what is and is not kosher:

> The fundamental flaw in defendant's argument is that the statutory provisions on which he relies are additional to, and do not replace, the provisions here challenged, which have been interpreted by the state courts as

> equating "kosher" with "prepared in accordance with orthodox Hebrew religious requirements." *See* N.Y. Agric. & Mkts. § § 201-a, 201-b, 201-c. Simply put, it is not reasonable to conclude that there is any likelihood that the state courts will treat these additional legislative requirements as fundamentally transforming the Kosher Laws into mere registration statutes. This is so, even if it is presumed that the state courts would if possible construe the Kosher Laws to avoid the constitutional question presented. *See Baggett v. Bullitt,* 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964).

Id. at 157.

ESTABLISHMENT CLAUSE

The Establishment Clause of the First Amendment to the United States Constitution, which applies to state governments through the Fourteenth Amendment, *Everson v. Board of Ed. of Ewing Tp.,* 330 U.S. 1, 8, 67 S.Ct. 504, 91 L.Ed. 711 (1947), provides that "Congress shall make no law respecting an establishment of religion ...."

On a facial challenge to a statute, the challenger must establish that no set of circumstances exists under which the statute would be constitutional. *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); *Deshawn E. v. Safir,* 156 F.3d 340, 347 (2d Cir.1998). "Statutes are presumed constitutional," *Bush v. Vera,* 517 U.S. 952, 992, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996), and "should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *Salinas v.*

United States, 522 U.S. 52, 59-60, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997).

Nonetheless, as on the abstention motion, "defendant asks this court to ignore the established interpretation of the statute by the state courts for the very reason that it raises constitutional questions." 986 F.Supp. at 157. This the court cannot do. As stated in *Terminiello v. City of Chicago,* 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949), "[the state court's] construction of the [statute] is a ruling on a question of state law that is as binding on us as though the precise words had been written into the [statute]." Thus, kosher under the Challenged Laws means prepared "in accordance with orthodox Hebrew religious requirements."

Defendant claims that, despite the authoritative construction of the statutes by the New York courts, the Department of Agriculture and Markets no longer interprets the word "kosher" to mean "in accordance with orthodox Hebrew religious requirements." Rather, defendant argues that the Challenged Laws speak in the disjunctive, in that they refer to products represented as "kosher" *or* as prepared "in accordance with orthodox Hebrew religious requirements." Defendant "recognizes that there is not a uniform consensus regarding what constitutes Kosher, and it is for this reason, among others, that defendant does not enforce the Law according to any particular religious standard."[11] *See* Defendant's Response to Plaintiff's Statement Pursuant to Local Rule 56.1 ¶ 9.

Whatever his purpose, defendant cannot now, when confronted with claims that the Challenged Laws violate the

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[11] Given my conclusion that this claim is legally insufficient, I do not address the evidence offered by plaintiff disputing defendant's contentions as to his enforcement.

Establishment Clause, renounce authoritative judicial interpretations of these laws and claim that a federal court should defer to the Department's claimed new interpretation.[12]

Moreover, defendant does not deny that the Challenged Laws require the State to enforce some level of religious standards. While arguing that "the Department does not impose religiously-based substantive standards on merchants" (Def. Reply Mem. at 7), defendant acknowledges that "[w]ithout *some* reference to religious doctrine, the State could never be able to assess whether such disclosures were being made in good faith," and that "[i]f ... the State may permissibly enact laws to prevent kosher fraud, the State must be allowed to refer to substantive Jewish law in implementing such measures." (Def. Reply Mem. at 13.) (emphasis in original).

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[12] Defendant's reliance on the doctrine of federal judicial deference to a federal agency's interpretation of federal law is also unavailing. The issue is not whether there has been a legislative delegation of authority to the New York State Department of Agriculture and Markets to interpret the Challenged Laws. *Cf. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.... In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"). Here, the state courts have explicitly and continuously construed the word "kosher" in the Challenged Laws to mean products "prepared in accordance with orthodox Hebrew religious requirements."

In *Hygrade Provision Co. v. Sherman,* 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402 (1925), the Supreme Court rejected a void for vagueness challenge to the New York kosher laws on the ground that they required that vendors represent as kosher only what they believe in good faith to be kosher noting that "the evidence, while conflicting, warrants the conclusion that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing." *Hygrade,* 266 U.S. at 501-502, 45 S.Ct. 141. The kosher laws in *Hygrade* were not challenged under the Establishment Clause.

I turn then to whether the Challenged Laws, as authoritatively construed by the New York courts, violate the Establishment Clause. The three- pronged *Lemon* test remains the starting point in facial challenges under the Establishment Clause, as the Supreme Court recently reiterated in *Santa Fe Independent School District v. Doe,* 530 U.S. ----, 120 S.Ct. 2266, 2281-82, 147 L.Ed.2d 295 (2000). *Lemon* requires a challenged law (1) to have a secular purpose, (2) to have a primary effect that neither advances nor inhibits religion, and (3) not to foster excessive state entanglement with religion. *Lemon v. Kurtzman,* 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745. Under the first prong of the *Lemon* test, state action is invalid only if the statute or activity was "motivated wholly by religious considerations." *Lynch v. Donnelly,* 465 U.S. 668, 680, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). The Challenged Laws were enacted at least in part to protect consumers of kosher products from fraud. *See Commack,* 986 F.Supp. at 154 (citing *Hygrade,* 266 U.S. at 501, 45 S.Ct. 141) ("The purpose of the statute manifestly, is to prevent and punish fraud ....") (quoting *People v. Atlas,* 183 A.D. 595, 596-97, 170 N.Y.S. 834 (1st Dept.1918), *aff'd without opinion,* 230 N.Y. 629, 130 N.E. 921 (1921)). Thus, the first prong of *Lemon* is satisfied.

In two recent cases in which the issues presented here were comprehensively addressed, the kosher fraud laws of the State of New Jersey and of Baltimore, Maryland were invalidated under the Establishment Clause as violating both the effect and excessive entanglement prongs of *Lemon*. *Ran-Dav's County Kosher Inc. v. State* 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied*, 507 U.S. 952, 113 S.Ct. 1366, 122 L.Ed.2d 744 (1993); *Borghout v. Bureau of Kosher Meat and Food Control*, 45 F.3d 1337 (4th Cir.1995). *But see National Foo[illegible] Inc. v. Rubin*, 727 F.Supp. 104, 109 (S.D.N.Y.1989), [illegible]re the court, noting that plaintiff was "not challenging [illegible]onstitutional validity of New York's kosher labeli[illegible] laws," rejected an Establishment Clause challenge t[illegible]e laws, as applied to plaintiff, on the ground that no [illegible]ological dispute" was claimed.

The New Jersey kosher [illegible]d regulations at issue in *Ran-Dav's* provided that it [illegible] "an unlawful consumer practice" to sell or attempt t[illegible]ll food "which is falsely represented to be Kosher," wi[illegible]osher defined as "prepared and maintained in strict c[illegible]iance with the laws and customs of the Orthodox J[illegible] religion." *Ran-Dav's*, 129 N.J. at 149, 608 A.2d 1353 New Jersey Supreme Court held the regulations uncon[illegible]onal under the Establishment Clause as creating an [illegible]sive entanglement between religion and the State a[illegible]aving the effect of advancing religion. Regarding th[illegible] of the word "kosher" in the regulations, the court c[illegible]ded that "there is considerable disagreement over wha[illegible]epts or tenets truly represent the laws of *kashrut* [kosh[illegible]nd that "there are differences of opinion concerning t[illegible]plication and interpretation of the laws of *kashrut* both [illegible]n Orthodox Judaism and between Orthodox Judaism a[illegible]ner branches of Judaism." *Id.* at 147, 608 A.2d 135[illegible] court found, however, that even if

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no such disagreement were present, the kosher fraud regulations still created excessive entanglement by involving the State in the enforcement of religious law not described in secular terms in the regulations. The court recognized that, although "civil courts may resolve controversies involving religious groups if resolution can be achieved by reference to neutral principles of law, ... they may not resolve such controversies if resolution requires interpretation of religious doctrine," *id.*, and that "the State's adoption and enforcement of the substantive standards of the laws of *kashrut* is precisely what makes the regulations religious, and is fatal to its scheme." *Id.* at 155, 608 A.2d 1353. Finally, the court concluded that, although "the regulations may have been designed to assure truth in marketing ... the truths being marketed are, in essence, religious truths." *Id.* at 167, 608 A.2d 1353.

In *Barghout,* the Court of Appeals for the Fourth Circuit struck down a Baltimore municipal ordinance making it a misdemeanor to, with intent to defraud, offer for sale any products labeled kosher, or indicating compliance "with the orthodox Hebrew religious rules and requirements and/or dietary laws," when the products did not in fact comply with those laws. The ordinance further stated that:

> In order to comply with the provisions of this section persons dealing with either kosher meat, meat preparations, food and/or food products only, or persons dealing with both kosher and non-kosher meat, meat preparations, food and/or food products must adhere to and abide by the orthodox Hebrew religious rules and regulations and the dietary laws; otherwise he shall be in violation of this section.

Id. The Fourth Circuit struck the ordinance as violative of the Establishment Clause, saying, "we think it clear that [the ordinance] is on its face unconstitutional in that it fosters excessive entanglement of religious and secular authority by vesting significant investigative, interpretive, and enforcement power in a group of individuals based on their membership in a specific religious sect," *Id.* at 1342, and that its primary effect was the "advancement and endorsement of the Jewish faith, and in particular the Orthodox Jewish faith."[13] 66 F.3d at 1346.

The New York laws challenged here provide that any person who, with intent to defraud, falsely represents food or food products as kosher, which, as discussed above, means "prepared in accordance with Orthodox Hebrew religious requirements," may be cited for criminal penalties. The Challenged Laws further provide for the Commissioner of the Department of Agriculture and Markets to appoint a nine-person "advisory board on kosher law enforcement" (referred to here as the Kosher Law Advisory Board). As will be seen, these laws, like those addressed by New Jersey Supreme Court and the Court of Appeals for the Fourth Circuit, violate both the excessive entanglement and effects prongs of *Lemon.*

The prohibition on excessive entanglements derives from an interpretation of the First Amendment as resting "upon the premise that both religion and government can best work to

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[13] In a concurring opinion, Judge Wilkins agreed with Judge Lay, who wrote the opinion for the Court, that the entanglement and effect prongs of *Lemon* were violated and also agreed, with Judge Luttig in *his* concurring opinion, that the ordinance violated *Larson v. Valente,* 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982), because it constituted an improper denominational preference.

achieve their lofty aims if each is left free from the other within its respective sphere." *People of Illinois ex rel. McCollum v. Board of Ed.*, 333 U.S. 203, 212, 68 S.Ct. 461, 92 L.Ed. 649 (1948). As the Supreme Court has elaborated, "some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, ... but the concept of a 'wall' of separation is a useful signpost." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982). "The core rationale underlying the Establishment Clause is preventing 'a fusion of governmental and religious functions.' " *Id.* at 126, 103 S.Ct. 505. Indeed, "the Framers did not set up a system of government in which important, discretionary governmental be would be delegated to or shared with religious institutions." *Id.* at 127, 103 S.Ct. 505. Thus, "a state may not delegate its civic authority to a group chosen according to a religious criterion." *Board of Ed. of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994).

"In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " *Lemon*, 403 U.S. at 612, 91 S.Ct. 2105 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)). The Challenged Laws violate all three prohibitions in that they require the sponsorship, financial support and active involvement of New York State in the daily monitoring of the compliance of vendors of kosher products with a set of religious dietary laws, which are incorporated by reference into the Challenged Laws. As defendant acknowledges, they necessarily require state officials to refer to and rely upon religious doctrines.

Defendant and the intervenors claim, however, that, under the Challenged Laws, the State enforces only "basic" rules of kosher food preparation, agreed upon by all consumers and vendors of kosher products, which do not involve the interpretation of any religious doctrine and therefore do not require the State to resort to religious authority. This argument is belied by the language of the Challenged Laws and their interpretation by the state courts. In the Challenged Laws, "kosher" means only prepared "in accordance with orthodox Hebrew religious requirements." Even where the Challenged Laws describe some specific procedures that must be followed before a product may properly be called kosher, the procedures refer back to orthodox Hebrew religious requirements; for example, meat "shall be washed in accordance with orthodox Hebrew religious requirements ... by a duly ordained orthodox rabbi or by a person authorized by him." N.Y. Agric. & Mkts. § 201-f.

The intervenors' argument that the Challenged Laws merely require vendors to conform their products to general consumer expectations does not eliminate the problem of excessive entanglement. The consumer expectations to which the intervenors are referring are expectations of the vendors' compliance with certain interpretations of religious law, outside of the language of the statutes. Even if the intervenors' argument that there is a consensus amongst Jews on the majority of issues as to what constitutes kosher were established,[14] that would not change the fact that, as stated in

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[14] Defendant acknowledges the existence of some differences among various groups as to the meaning of kosher. The intervenors do as well, but they argue that any differences are peripheral and resolvable under the "good faith" defense. *See infra,* at pp. 455-56. Plaintiffs for their part have established that defendant did not accept as a defense a

Ran-Dav's, "the laws of *kashrut* are intrinsically religious, whether they are ambiguous or not and whether they are disputed or not. Religious doctrines cannot be recast as secular principles simply because they are clear. Nor do religious doctrines become neutral simply because they are widely or even universally held." *Id.* at 161, 608 A.2d 1353 (citations omitted). As the New Jersey Supreme Court said of the regulations at issue in *Ran-Dav's*, 129 N.J. at 155, 608 A.2d 1353, "the State itself takes on the traditional religious supervisory role, thereby partially supplanting the Jewish organizations and institutions that historically have stood as final judges of religious matters."

The intervenors' attempts to analogize the Challenged Laws to prohibitions on selling a product marked "approved by the Vatican," if the product has not been so approved, or against advertising that a crucifix is made out of fourteen carat gold if it is not, are not persuasive; in fact, the purported analogies highlight the flaws in the Challenged Laws. The intervenors' examples would require the State simply to enforce a prohibition against vendors from engaging in garden-variety secular fraud: in the first instance, from claiming that a particular authority has endorsed their product if it has not, and in the second instance, from claiming that a product is made of a certain material if it is not. Unlike here, there would be no need for the State to rely on any religious doctrine to determine compliance with State law. Indeed, the intervenors' examples of permissible regulation more closely resemble the unchallenged disclosure statutes referred to in footnote 2.

Nor does the availability of an implied "good faith"

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statement that their meat was prepared to the satisfaction of "a rabbi of the Jewish faith" who provided kosher supervision to them.

defense to an alleged violation, arising out of the Challenged Laws' requirement of an intent to defraud, *see Hygrade,* 266 U.S. at 501-02, 45 S.Ct. 141, save them from an Establishment Clause challenge. The intervenors and defendant claim that, if a vendor asserted that it believed in good faith that its products were kosher, even if they were not, the vendor would not be prosecuted. An identical argument was rejected in *Barghout* in the following language: "Whether prosecution under the ordinance focuses on the subjective intent of the vendor, or on the vendor's compliance with the Orthodox standards of kashrut, the ordinance still fosters excess entanglement between city officials and leaders of the Orthodox faith with each and every prosecution." 66 F.3d at 1344. The same is true here, where daily enforcement of the Challenged Laws requires state officials to determine the content of religious law. Moreover, under the Challenged Laws, a vendor who believes in good faith that its products are kosher under a standard other than the orthodox standard cannot avail itself of a good faith defense because, given the statutory meaning of kosher, as authoritatively established by the New York courts, that defense requires vendors to claim that they had a good faith belief that their products were kosher in accordance with orthodox Hebrew religious requirements.

The Challenged Laws thus are unlike the generally applicable mail fraud statute involved in *Ballard v. United States,* 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946), where criminal defendants were charged with using the mails to fraudulently promote a religious movement, and the Court upheld the withholding from the jury of any issue as to the truth or falsity of their religious beliefs but asked the jury to determine whether the defendants honestly and in good faith believed what they claimed to believe. Also instructive in this regard is *Jackson v. Mann,* 196 F.3d 316 (2d Cir.1999), where the Court of Appeals for the Second Circuit reversed a

grant of summary judgment to defendant prison officials, who had denied an inmate a kosher diet in reliance on the prison chaplain's conclusion that the inmate did not meet the chaplain's definition of a Jew as "one who was born Jewish or has formally converted." Rejecting an Establishment Clause claim on the ground that the issue was "more properly anchored in the Free Exercise Clause," the Court held that "whether Jackson's beliefs are entitled to Free Exercise protection turns on whether they are 'sincerely held,' not on the 'ecclesiastical question' whether he is in fact a Jew under Judaic law." 196 F.3d at 321.

The Challenged Laws do not create excessive entanglement simply because they use a word of religious significance. *See Jones v. Butz,* 374 F.Supp. 1284, 1292-93 (S.D.N.Y.1974), *aff'd,* 419 U.S. 806, 95 S.Ct. 22, 42 L.Ed.2d 36 (1974). *Jones* involved a challenge by animal rights activists who were concerned that exempting slaughter "in accordance with the ritual requirements of the Jewish faith or any other religious faith" from the Humane Slaughter Act, 7 U.S.C. § § 1901 *et seq.* (1970), would lead to animal rights violations, and was a violation of the Establishment Clause. The district court held that the Act permissibly accommodated the free exercise of religion and did not involve excessive entanglement. In contrast, the Challenged Laws foster excessive entanglement and advance religion because they require the State to affirmatively assume ongoing obligations of enforcement of purely religious laws, inevitably requiring the State to rely on religious authority and interpretation to properly enforce them. Thus, *Jones* offers no basis for upholding the laws challenged here. *See Ran-Dav's,* 129 N.J. at 165, 608 A.2d 1353; *Barghout,* 66 F.3d at 1343 (both distinguishing the kosher fraud law enforcement system from the constitutional religious exemption present in *Jones*).

Cases upholding the constitutionality of statutes such as Sunday closing laws are similarly inapposite. First, "the governmental functions involved [in those cases] have no connection with any religious practices." *Jones,* 374 F.Supp. at 1293.

> We are not here confronted with legislation that is religious only in its historical origins but non-religious in its current applications. *E.g., McGowan v. Maryland,* 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) (stating that Sunday closing laws, although religious in origin, are applied without reference to religious purpose or principles); (other citations omitted). The kosher regulations rely expressly on religious tenets concerning what is kosher and who should be trusted to supervise kosher food preparation.

Ran-Dav's, 129 N.J. at 163-4, 608 A.2d 1353; *Lemon,* 403 U.S. at 619, 91 S.Ct. 2105; *see also Lynch,* 465 U.S. at 683, 104 S.Ct. 1355 (in upholding the constitutionality of a city's creche display, the Court noted that "there is nothing here, of course, like the 'comprehensive, discriminating and continuing state surveillance' or the 'enduring entanglement' present in *Lemon.*")

Not only do the entanglements between the State and religion engendered by the Challenged Laws, in themselves, violate the First Amendment, but they also, by their nature, reflect an impermissible state advancement of religion. As stated in *Ran-Dav's:* "The Kosher regulations rely expressly on religious tenets concerning what is kosher and who should be trusted to supervise kosher food preparation. Because they work both as a constraint and as an inducement on merchants who must abide by them, and consumers who

cannot avoid them, the primary, if not exclusive, effect of the regulatory process necessarily is to advance particular religious tenets." 129 N.J. at 164, 608 A.2d 1353. In *Larkin v. Grendel's Den, Inc., supra*, the Supreme Court struck down a Massachusetts zoning statute which permitted a church to veto the issuance of a liquor license to any establishment located within a 500-foot radius of the church. The Supreme Court found that the law in *Larkin* failed the *Lemon* test and violated the Establishment Clause because it both fostered excessive entanglement of government with religion and had the effect of advancing religion. "Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government;" and "the mere appearance of a joint exercise of legislative authority by Church and State provides significant benefit to religion in the minds of some by reason of the power conferred." *Larkin*, 459 U.S. at 125-126, 103 S.Ct. 505.

In *Board of Ed. of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994), the Supreme Court extended *Larkin* in holding that a state legislature not only may not expressly delegate governmental duties to a religious institution, but also may not otherwise "identif[y] ... recipients of governmental authority by reference to doctrinal adherence." *Grumet*, 512 U.S. at 699, 114 S.Ct. 2481. In *Grumet*, it struck down a New York statute which had created an independent school district known as the Village of Kiryas Joel, populated entirely by members of the Satmar Hasidic sect of Judaism. The Court found that, while the statute did not expressly delegate governmental authority based on religious criteria, it effectively did so, and thus was unconstitutional. *Id.* at 698- 699, 114 S.Ct. 2481. The Court held that "because both the district's public- school population and its school board would be exclusively Hasidic, the statute created a 'symbolic

union of church and State' that was 'likely to be perceived by the Satmarer Hasidim as an endorsement of their religious choices, or by nonadherents as a disapproval' of their own. As a result, ... the statute's primary effect was an impermissible advancement of religious belief." *Id.* at 695, 114 S.Ct. 2481 (citations omitted).

Relying particularly on *Agostini v. Felton,* 521 U.S. 203, 222-23, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997), the intervenors argue that changes in Establishment Clause jurisprudence since the decisions in *Ran-Dav's,* in 1993, and *Barghout,* in 1995, compel a result different from the result in those cases. In *Agostini,* the Supreme Court held constitutional a federally-funded program that sent public school teachers into parochial schools to provide secular remedial education to disadvantaged children. In doing so, the Court refined the "effect" prong of the *Lemon* test, as it applies to public aid to religious schools, and recognized that not all entanglements have the impermissible effect of advancing or inhibiting religion. *Agostini,* 521 U.S. at 232-33, 117 S.Ct. 1997. *See also Mitchell v. Helms,* 530 U.S.----, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000), plurality opinion at 2540-41 and concurring opinion at 2560. It noted that it had "abandoned the presumption erected in *Meek* [*v. Pittenger,* 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975)] and [*School District of the City of Grand Rapids v.*] *Ball,* [473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985)] that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Agostini,* 521 U.S. at 223, 117 S.Ct. 1997.

In contrast to *Agostini,* state officials in this case are charged with enforcing a set of religious laws. In *Doe v. Beaumont Independent School District,* 173 F.3d 274, 287-

88 (5th Cir.1999), the court found that neutrality in neither favoring nor disfavoring religion was the key factor supporting the constitutionality of the program in *Agostini*, and it held that volunteer counseling by clergy in public schools violated the Establishment Clause. The Fifth Circuit, in distinguishing *Doe* from *Agostini*, noted that "when the government administers programs and distributes benefits according to neutral criteria which only incidentally benefit religious organizations, there is little danger that people will perceive any official endorsement of those organizations' beliefs. By contrast, there is a much greater danger that when religious organizations and representatives participate in the affairs of government--at least when they do so not as an indistinguishable part of a larger effort, but rather in a manner clearly distinct and identifiable--such participation will create the clear impression that the government has reached out to such religious organizations and representatives precisely because of their religious affiliations." *Id.* at 288 n. 59.

The same analysis applies here, where New York State has enacted laws specifically mandating what products may be called "kosher" and has incorporated "orthodox Hebrew religious requirements" into State law. In addition, the State has created the Kosher Law Advisory Board to "advise, counsel and confer" with the Commissioner of the Department of Agriculture and Markets "on matters of policy in connection with the administration and enforcement" of the laws relating to kosher food; to, "on its own initiative ... recommend" changes to the laws to the Commissioner; and with the consent of the Commissioner, to submit for enactment by the legislature, drafts of legislation "imposing further restrictions" on the sale of kosher food products. N.Y. Agric. & Mkts. § 26-a(4).

The intervenors and defendant emphasize that New

York's Challenged Laws do not place enforcement directly in the hands of religious authorities, nor require any government officials to have religious qualifications. But the Supreme Court has recently reminded us that "context" is important in evaluating a facial challenge under the Establishment Clause. *Santa Fe,* 530 U.S. at ----, 120 S.Ct. at 2282. It is incontrovertible, given the context, that in order to consistently enforce the religious code adopted by the Challenged Laws, New York State is forced to rely on advisors chosen specifically because of their religious knowledge.[15] *See Ran-Dav's,* 129 N.J. at 156, 608 A.2d 1353. As stated in *Barghout,* "[s]imply put, even if membership in the Bureau were not restricted to adherents of Orthodox Judaism or even if there were no Bureau at all, [the ordinance's] adoption of the Orthodox rules inevitably requires the intimate involvement of members of that faith, and the leaders of that faith, in discerning the applicable standard." *Barghout,* 66 F.3d at 1343-1344. And, "although the [State] has not expressly endorsed Orthodox Judaism or encouraged its practice by passing the ordinance, the incorporation of the Orthodox standard creates an impermissible symbolic union of church and state." *Id.* at 1345.

For the reasons stated above, and even taking *Agostini* beyond its school aid context, the entanglements involved here between religion and the State are not only excessive, in themselves, but they have the unconstitutional effect of endorsing and advancing religion. In sum, the Challenged Laws on their face violate the Establishment

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[15] The defendant Director of the Kosher Law Enforcement Division is a rabbi, and as of the filing of defendant's brief, New York's Kosher Law Advisory Board consisted of six rabbis, one government official, and two "professionals." Deft. Br. at 12.

Clause of the United States Constitution. In light of this conclusion, the plaintiffs' other claims, under the federal and state constitutions, need not be addressed.

CONCLUSION

The Challenged Laws, N.Y. Agric. & Mkts. Law § § 201-a, 201-b(1), 201-c, 201-e (2-a) and (3-c), 201-f, 201-h and 26-a, on their face violate the Establishment Clause and are therefore unconstitutional. Plaintiffs' motion for summary judgment is granted with respect to their claims regarding these Sections. Defendant's and intervenors' motions for summary judgment are denied. The Clerk of Court is directed to enter judgment declaring the Challenged Laws unconstitutional and permanently enjoining defendant from enforcing them.

SO ORDERED.

106 F.Supp.2d 445

APPENDIX D

ARKANSAS

ARK. CODE ANN. § 20-57-401 (Michie 2001)

Kosher foods

Any person who:

(1) Shall sell or expose for sale in any restaurant, delicatessen, hotel, or other place where food products are sold, any article of food falsely represented as kosher either by direct statements orally or in writing, or by the display of the word "kosher" in English or Hebrew letters, by the display of any sign or mark in simulation of the word, or by the display of any insignia, six-pointed star, or any mark which might reasonably be calculated to deceive or lead a reasonable person to believe that a representation is being made that the food exposed for sale, or sold, is kosher or is prepared in accordance with the orthodox Hebrew religious requirements;

(2) With intent to defraud, sells or exposes for sale any meat or meat preparations and falsely represents the product to be kosher, whether the meat preparations are raw or prepared for human consumption, or as having been prepared under, and of products sanctioned by, the orthodox Hebrew religious requirements, or who falsely represents any food product or the contents of any package or contained in a container to be so constituted and prepared by having or permitting to be inscribed upon it the word "kosher" in any language; or

(3) Sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, either

raw or prepared for human consumption, and who fails to indicate on his window signs and all display advertisements, in black letters at least four inches (4") in height: "KOSHER AND NONKOSHER MEAT SOLD HERE", or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparations either raw or prepared for human consumption, and who fails to display over each kind of meat or meat preparations so exposed a sign in black letters at least four inches (4") in height, reading: "KOSHER" and "NONKOSHER" as the case may be, is guilty of a misdemeanor and punishable by a fine of not more than five hundred dollars ($500) or by imprisonment of not less than thirty (30) days or not more than six (6) months, in the discretion of the court.

CALIFORNIA

CAL. PENAL CODE § 383b (West 2002)

Kosher meats and meat preparations; sale and labeling regulations; false representations; punishment; kosher defined

Every person who with intent to defraud, sells or exposes for sale any meat or meat preparations, and falsely represents the same to be kosher, whether such meat or meat preparations be raw or prepared for human consumption, or as having been prepared under and from a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product, or the contents of any package or container, to be so constituted and prepared, by having or permitting to be inscribed thereon the words "kosher" in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human

consumption, who fails to indicate on his window signs in all display advertising in block letters at least four inches in height "kosher and nonkosher meats sold here"; or who exposes for sale in any show window or place of business as both kosher and nonkosher meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height, reading "kosher meat" or "nonkosher meat" as the case may be; or sells or exposes for sale in any restaurant or any other place where food products are sold for consumption on the premises, any article of food or food preparations and falsely represents the same to be kosher, or as having been prepared in accordance with the orthodox Hebrew religious requirements; or sells or exposes for sale in such restaurant, or such other place, both kosher and nonkosher food or food preparations for consumption on the premises, not prepared in accordance with the Jewish ritual, or not sanctioned by the Hebrew orthodox religious requirements, and who fails to display on his window signs in all display advertising, in block letters at least four inches in height "kosher and nonkosher food served here" is guilty of a misdemeanor and upon conviction thereof be punishable by a fine of not less than one hundred dollars ($100), nor more than six hundred dollars ($600), or imprisonment in the county jail of not less than 30 days, nor more than 90 days, or both such fine and imprisonment.

The word "kosher" is here defined to mean a strict compliance with every Jewish law and custom pertaining and relating to the killing of the animal or fowl from which the meat is taken or extracted, the dressing, treatment and preparation thereof for human consumption, and the manufacture, production, treatment and preparation of such other food or foods in connection wherewith Jewish laws and customs obtain and to the use of tools, implements, vessels, utensils, dishes and containers that are used in connection

with the killing of such animals and fowls and the dressing, preparation, production, manufacture and treatment of such meats and other products, foods and food stuffs.

CONNECTICUT

CONN. GEN. STAT. ANN. § 53-317 (West 2002)

Fraudulent sale of kosher meat, meat products and other food

(a) Any person who, with intent to defraud, sells or exposes for sale any meat or meat preparation, whether raw or prepared for human consumption, and falsely represents the same to be kosher, or as having been prepared in accordance with, and of a product or products sanctioned by, the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word "kosher" in any language, or otherwise; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, and fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, "KOSHER AND NONKOSHER MEAT SOLD HERE"; or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, and fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading "KOSHER MEAT" or "NONKOSHER MEAT", as the case may be; shall be fined not more than one hundred dollars or imprisoned not more than six months or both.

(b) Any person who, with intent to defraud, sells or exposes

for sale in any restaurant or other place where food products are sold for consumption on the premises, any article of food or food preparation and falsely represents the same to be kosher or as having been prepared in accordance with the orthodox Hebrew religious requirements, either by direct statements, orally or in writing, or by the display of the word "kosher" in English or Hebrew letters, or by the display of any sign or mark in simulation of such word, or by the display of any insignia, six-pointed star, or any mark reasonably calculated to deceive or lead a reasonable person to believe that the food sold is kosher or prepared in accordance with the orthodox Hebrew religious requirements; or who sells or exposes for sale in such restaurant or such other place both kosher and nonkosher food or food preparations for consumption on the premises not prepared in accordance with the Jewish ritual or not sanctioned by the Hebrew orthodox religious requirements and fails to display on his window signs and all display advertising in block letters at least four inches in height, "KOSHER AND NONKOSHER FOOD SERVED HERE", shall be fined not more than one hundred dollars or imprisoned not more than six months or both.

GEORGIA

GA. CODE ANN. § 26-2-330 (2002)

Definitions

As used in this article, the term:

(1) "Food" means any meat, meat preparation, articles of food, or food products, either raw or prepared for human consumption, and whether to be consumed on the premises where prepared or sold or whether to be taken elsewhere for consumption.

(2) "Kosher food" means food prepared under and of products sanctioned by the orthodox Hebrew religious rules and requirements and includes foods prepared for the festival of Passover and termed as "Kosher for Passover."

(3) "Person" means any hotel, inn, delicatessen, grocery, butcher shop, restaurant keeper, or any individual, firm, or corporation operating a boarding house, eating house, lunchroom business, or catering business.

ILLINOIS

410 ILL. COMP. STAT. ANN. 645/1 (West 2002)

Kosher food products

§ 1. (a) Every person, who, with intent to defraud, sells, or exposes for sale any meat or meat preparations and falsely represents the same to be kosher, whether such meat or meat preparations be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the Code of Jewish Laws; or falsely represents any food product or the contents of any food package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word "kosher" in any language; or in any sign, display or advertisement characterizes his place of business as a "kosher" establishment if non-kosher food products are sold or offered for sale in such place of business; or who, while dealing or purporting to deal in kosher meat or meat preparations, prepares or handles or sells, or causes to be prepared or handled or sold, any food products which, when so prepared or handled or sold together with kosher meat or meat preparations, constitute a violation of the Code of Jewish Laws, and thereby render such kosher meat or meat

preparations, so handled or sold in conjunction therewith, non-kosher, or who otherwise in the preparation, handling, and sale of such kosher meat or meat preparations fails to comply with such religious requirements and dietary laws necessary to constitute such meat or meat preparations kosher, or who, without complying with such religious or dietary laws, issues or maintains any sign or advertisement in any language purporting to represent that he sells or deals in kosher meat or meat preparations, shall be deemed guilty of a misdemeanor and subject to the penalty provided for in Section 2 of this Act.

(b) It shall be unlawful to label or designate food or food products with the words parve or pareve knowing that such food or food products contain milk, meat or poultry products rendering such food products impermissible to be used or eaten according to Code of Jewish Laws.

(c) Any food commodity in package form which is marked as being certified by an organization, identified on the package by any symbol or is marked as being Kosher shall not be offered for sale by the producer or distributor of such food commodity until 30 days after such producer or distributor shall have registered the name, current address and telephone numbers of the certifying organization or the supervising rabbi with the Illinois Department of Agriculture.

KENTUCKY

KY. REV. STAT. ANN. § 367.850 (Banks-Baldwin 2002)

False Representation of Kosher Meats or Meat Preparations; Advertising; Sale

(1) A person who, with intent to defraud, sells or exposes for

sale any meat or meat preparations, and falsely represents the same to be kosher, whether such meat or meat preparations be raw or prepared for human consumption, or as having been prepared under, and of a product or products sanctioned by, the orthodox Hebrew religious requirements, either by direct statement orally, or in writing, which might reasonably be calculated to deceive or lead a reasonable man to believe that a representation is being made that such meat or meat preparation is kosher or prepared in accordance with the orthodox Hebrew religious requirements, or falsely represents any meat products or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word "kosher" in any language; or sells or exposes for sale in the same place of business both kosher and non-kosher meat or meat preparations, whether raw or prepared for human consumption, and who fails to indicate on his window signs and all display advertising, in block letters at least four (4) inches in height, "kosher and non-kosher meat sold here"; or who exposes for sale in any show window or place of business both kosher and non-kosher meat or meat preparations, either raw or prepared for human consumption, and who fails to display over each kind of meat or meat preparations, so exposed a sign in block letters at least four (4) inches in height reading "kosher meat," or "non-kosher meat," as the case may be, or who displays on his window, or in his place of business, or in handbills or other printed matter distributed in or outside of his place of business, words or letters in Hebraic characters other than the word "kosher," or any sign, emblem, insignia, six (6) pointed star, symbol, or mark in simulation of same, without displaying in conjunction therewith, in English letters of at least the same size as such characters, signs, emblems, insignia, symbols, or marks, the words "we sell kosher meat only," or "we sell non-kosher meat only," or "we sell both kosher and non-kosher meat," as the case may be, is guilty of a

misdemeanor. Possession of non-kosher meat or meat preparations, in any place of business advertising the sale of kosher meat and meat preparations only, is presumptive evidence that the person in possession exposes the same for sale with intent to defraud, in violation of the provisions of this section.

(2) A person who, with intent to defraud, sells or exposes for sale in any hotel, restaurant, or other place where meat products are sold for consumption on or off the premises, and falsely represents the same to be kosher, whether such meat or meat preparations, be raw or prepared for human consumption, or as having been prepared under, and of a product or products sanctioned by the orthodox Hebrew religious requirements, either by direct statement orally, or in writing, which might reasonably be calculated to deceive or lead a reasonable man to believe that a representation is being made that such meat is kosher or prepared in accordance with the orthodox Hebrew religious requirements, or falsely represents any meat or meat product or the contents of any package to be so constituted and prepared, by having or permitting to be inscribed thereon the word "kosher" in any language; or sells or exposes for sale in the same place of business both kosher and non-kosher meat or meat preparations, either raw or prepared for human consumption, and who fails to indicate on his window signs and all display advertising, in block letters at least four (4) inches in height, "kosher and non-kosher meat sold here," either raw or prepared for human consumption, and who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four (4) inches in height reading "kosher meat" or "non-kosher meat," as the case may be, or who displays on his window, door, or in his place of business, or in handbills or other printed matter distributed in or outside of his place of business, words or letters in Hebraic characters other than the word "kosher," or

any sign, emblem, insignia, six (6) pointed star, symbol, or mark in simulation of same, without displaying in conjunction therewith in English letters of at least the same size as such characters, signs, emblems, insignia, symbols, or marks the words "we sell kosher meat only," or "we sell non-kosher meat only," or "we sell both kosher and non-kosher meat," as the case may be, is guilty of a misdemeanor. Possession of non-kosher meat, in any place of business advertising the sale of kosher meat only, is presumptive evidence that the person in possession exposes the same for sale with intent to defraud, in violation of the provisions of this section.

LOUISIANA

LA. REV. STAT. ANN. § 608.2 (West 2002)

Unlawful practices in sale of kosher food; penalty

A. It shall be unlawful for any person to:

(1) Sell or expose for sale with intent to defraud in any place where food products are sold for consumption either on or off the premises, any article of food falsely represented as kosher, either by direct statements, orally or in writing, or by the display of the word kosher in English or Hebrew letters, or by the display of any sign or mark in simulation of such word, or by display of any insignia, six pointed star, or any mark which might reasonably be calculated to deceive or lead a reasonable person to believe that a representation is being made that the food exposed for sale is kosher, or prepared in accordance with orthodox Hebrew religious requirements; or

(2) Sell or expose for sale with intent to defraud any meat or meat preparations and falsely represent the same to be

kosher, with intent to defraud, whether such meat or meat preparations be raw or prepared for human consumption, or as having been prepared under and a product or products sanctioned by the orthodox Hebrew religious requirements; or

(3) Falsely represent with intent to defraud any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word kosher in any language.

B. The word kosher as used in Subsection A of this Section shall mean in conformity with orthodox Jewish religious requirements.

C. Any person violating the provisions of this Section shall be guilty of a misdemeanor and upon conviction shall be fined not more than five hundred dollars and each such violation shall constitute a separate offense.

MASSACHUSETTS

MASS. GEN. LAWS ANN. ch. 94, § 156 (West 2002)

Kosher food; labeling, sale and display; civil penalties

(a) No person shall label, stamp, sell, advertise or expose for sale or permit such labeling, stamping, selling, advertising or exposing for sale any can, jar, or other package containing fruit or food of any kind, or unpackaged fruit or food of any kind, whether raw or prepared, including but not limited to any meat, meat product, poultry, poultry product, fish, bread, wine, or any food containing meat or poultry ingredients or prepared with meat or poultry substance or meat or poultry fat; and

(1) knowingly falsely represent the same to be kosher, kosher for Passover, pareve, or as having been prepared in accordance with orthodox Jewish religious standards either by direct statements, orally or in writing, or by display of the word "Kosher", "Kosher for Passover" or "Pareve" in any language or by the display, advertising, use on a label or on any package of any sign or mark in simulation of such word or words, which might reasonably be calculated to cause a reasonable person to believe that a representation is being made that the food sold is kosher, kosher for Passover or pareve, or prepared in accordance with orthodox Jewish religious standards; or

(2) in any language, knowingly display, advertise, use on a label or use on a package the word "Kosher" in conjunction with the words "style" or "type" or any similar expression which might reasonably be calculated to deceive a reasonable person to believe that a representation is being made that the food sold is kosher, kosher for Passover or pareve, or prepared in accordance with orthodox Jewish religious standards; or

(3) in any language, display, advertise, use on a label or use on any package the words "Jewish" or "Hebrew" in conjunction with the words "style" or "type" or any similar expression, or any Hebrew letter or word, insignia, six-pointed star or any other mark or word or words with the intention of deceiving a reasonable person to believe that a representation is being made that the food sold is kosher, kosher for Passover or pareve or prepared in accordance with orthodox Jewish religious standards.

It shall not be violation of clauses (2) and (3) of this subsection if such person makes a good faith effort to display a notice on or within close proximity to such food items or products or in a prominent location within the premises,

which is reasonably calculated to inform a reasonable person that such food items or products are non-kosher, not kosher for Passover, not pareve, or not prepared in accordance with orthodox Jewish religious standards.

(b) No person shall sell or expose for sale both kosher and non-kosher food of any kind, and at the same time display a sign on his door or window or anywhere in front of his place of business bearing the word "Kosher", "Kosher for Passover" or "Pareve" in any language or any sign or mark in simulation of such word or words or any Hebrew letter or word, insignia, six-pointed star or any other mark or other words which might lead a reasonable person to believe that all food sold in such place is kosher, kosher for Passover, pareve or prepared in accordance with orthodox Jewish religious standards, unless such person also displays in his window or door a separate sign or lettering upon the same sign which makes a representation that kosher food is being sold, stating "Non- Kosher Food Also Sold Here" in block letters in a size which will call such fact to the reader's attention or in a size that the attorney general may specify by regulation. No person shall display a sign anywhere within his place of business which represents or denotes a section of such place of business as a special section for kosher for Passover items, and no person shall sell or expose for sale both kosher for Passover and non-Kosher for Passover freshly baked food or food products and display a sign on his door, window or anywhere in front or within his place of business that kosher for Passover food or food products are being sold, unless such person also displays a separate sign or lettering upon the same sign stating in block letters "Non-Kosher for Passover Items Also Sold Here" in a size which will call such fact to the reader's attention or in a size that the attorney general may specify by regulation.

(c) No person shall advertise for sale in the same advertisement both kosher and non-kosher food items of any kind, if such advertisement bears the word or words "Kosher", "Kosher for Passover" or "Pareve" in any language or any sign or mark in simulation of such word or words or any Hebrew letter or word, insignia, six-pointed star or other mark or other words which might lead a reasonable person to believe that all the food sold in such place is kosher, kosher for Passover, pareve or prepared in accordance with orthodox Jewish religious standards, unless such advertisement also includes the statement "We Sell Both Kosher and Non-Kosher Food" in a size which will call such fact to the reader's attention or a size that the attorney general may specify by regulation. No person shall advertise for sale in the same advertisement both kosher for Passover and non-kosher for Passover items of any kind, if a reasonable person might reasonably believe that only kosher for Passover food is being sold on the premises, unless such advertisement also includes the statement "We Sell Both Kosher for Passover and Non-Kosher for Passover Food" in a size which will call such fact to the reader's attention or a size that the attorney general may specify by regulation.

(d) No person shall willfully remove, deface, obliterate, cover, alter or destroy or cause to be removed the original slaughterhouse identification tag or any other mark, stamp, tag, brand, label, or any other means of identification affixed to foods or food products to indicate that such foods or food products are kosher, kosher for Passover, pareve or have been prepared in accordance with orthodox Jewish religious standards and represent the same food item to be kosher, kosher for Passover, pareve, or as having been prepared in accordance with orthodox Jewish religious standards either by direct statements, orally or in writing, or by display of the word "Kosher", "Kosher for Passover" or "Pareve" in any language or by the display, advertising, use on a label or on

any package, of any sign or mark in simulation of such word or words, or by the display, advertising, use on a label or on any package of the words "Jewish", "Hebrew" or "Kosher" either alone or in conjunction with the words "style" or "type" or any similar expression or any Hebrew letter or word, insignia, six-pointed star or any other mark or other words which might reasonably be calculated to deceive or lead a reasonable person to believe that a representation is being made that the food sold is kosher, kosher for Passover, pareve, or prepared in accordance with orthodox Jewish religious standards.

No person shall knowingly sell, dispose of or have in his possession, for the purpose of sale to any person as kosher, kosher for Passover, pareve, or as having been prepared in accordance with orthodox Jewish religious standards any food or food product which does not have affixed thereto the original slaughterhouse identification tag, or any other mark, stamp, tag, brand, label or other means of identification employed to indicate that such food or food products are kosher, kosher for Passover, pareve or have been prepared in accordance with orthodox Jewish religious standards, if such a means of identification was originally affixed to the food or food product.

No person shall knowingly sell, dispose of or have in his possession, for the purpose of sale to any person as kosher, kosher for Passover, pareve or as having been prepared in accordance with orthodox Jewish religious standards, any food or food products to which such slaughterhouse identification tag or any other mark, stamp, tag, brand, label or other means of identification has or have been fraudulently affixed.

Nothing in this subsection (d), except the third paragraph hereof, shall prevent any person from having in his

possession solely for the purpose of human consumption any food item or food product or from selling, disposing of or having in his possession, for the purpose of sale to any person as kosher, kosher for Passover, or as having been prepared in accordance with orthodox Jewish religious standards any chopped meat, or individual cuts of meat or poultry parts if such chopped or cuts of meat or such poultry parts are labeled with the same information as found on the original slaughterhouse identification tag or any other mark, stamp, tag, brand, label or other means of identification attached to the original piece of meat or poultry before such chopping or sectioning occurred.

(e) Any person who sells fresh meat or poultry advertised or represented to be kosher, kosher for Passover or as having been prepared in accordance with orthodox Jewish religious standards shall retain, on the premises, or in a location within the commonwealth which is readily available, for inspection, during regular business hours, upon request by the attorney general, for one year, a true and legible copy of all invoices and records of cash or charge transactions from the packer or producer of such meat or poultry and all bills of lading and receiving and shipping papers and shall provide these documents, and other evidence of the source of such meat or poultry being housed or sold by that person to the attorney general, upon request.

(f) No person, firm, association or corporation shall sell, offer or expose for sale any food or food product which it has manufactured, distilled, produced, processed or packed if such food or food product is represented as or branded kosher, kosher for Passover, pareve or as having been prepared in accordance with orthodox Jewish religious standards unless such person, firm, association or corporation provides the name and address of and a letter from the certifying authority which certifies that such products are kosher, kosher for Passover, pareve or as having been prepared in accordance with orthodox Jewish religious standards, and no person shall misrepresent the identity of such certifying authority in any such letter.

As used in this section, the term "certifying authority" shall include, but not be limited to the certifying organization, rabbi or individual.

(g) The attorney general shall enforce the provisions of this section. Pursuant to chapter thirty A, the attorney general may promulgate regulations to enforce the provisions of this section. The attorney general may enter at any time during business hours upon premises where food represented to be kosher, kosher for Passover, pareve or as having been prepared in accordance with orthodox Jewish religious standards is sold or exposed for sale and inspect such food, premises or documentation of purchases to determine compliance with this section. The attorney general shall assess civil penalties or fines as a result of any violation of this section.

(h) Any and each violation of this section, section one hundred and fifty-four and section one hundred and fifty-five shall be punishable by a civil penalty or fine of not less than five hundred dollars and not more than two thousand dollars; provided, however, that not more than one civil penalty or

fine shall be assessed for violations of this section associated with a single item at a single location. For the purposes of this section, the term "item" shall mean a specific and distinct product, good or commodity. One item is differentiated from another by having a different universal product code for items so coded, and for items not so coded, the item has any distinguishing characteristics compared to another item.

(i) Any violation of subsections (a), (d) or any misrepresentation of the identity of a certifying authority shall be an unfair or deceptive act or practice in the conduct of trade or commerce, and any person aggrieved thereby may seek relief under the provisions of section nine of chapter ninety-three A.

(j) It shall be a complete defense to a prosecution under this section that the defendant relied in good faith upon the representation of a slaughterhouse, manufacturer, processor, packer or distributor or any organization which certifies or represents any food or food product at issue to be kosher, kosher for Passover, pareve or as having been prepared in accordance with orthodox Jewish religious standards.

MICHIGAN

MICH. COMP. LAWS ANN. § 750.297e (West 2002)

Kosher food products; definition of "kosher"; fraudulent sale and marking of foods; investigation; penalty

Sec. 297e. (1) As used in this section, "kosher" means prepared or processed in accordance with orthodox Hebrew religious requirements sanctioned by a recognized orthodox rabbinical council.

(2) A person who, with intent to defraud, sells or exposes for sale any meat or meat preparations, article of food or food products, and falsely represents the same to be kosher, whether such meat or meat preparations, article of food or food products are raw or prepared for human consumption, either by direct statement orally, or in writing, which might reasonably be calculated to deceive or lead a reasonable man to believe that a representation is being made that such food is kosher or falsely represents any food products or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word "kosher" in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, or both kosher and nonkosher food or food products, either raw or prepared for human consumption, and who fails to indicate on his window signs and all display advertising, in block letters at least 4 inches in height, "kosher and nonkosher meat sold here" or "kosher and nonkosher food sold here"; or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparations, or kosher and nonkosher food or food products, either raw or prepared for human consumption, and who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least 4 inches in height reading "kosher meat" or "nonkosher meat", or "kosher food" or "nonkosher food", or who displays on his window, door or in his place of business, or in handbills or other printed matter distributed in or outside of his place of business, words or letters in Hebraic characters other than the word "kosher", or any sign, emblem, insignia, 6-pointed star, symbol or mark in simulation of same, without displaying in conjunction therewith in English letters of at least the same size as such characters, signs, emblems, insignia, symbols or marks, the words "we sell kosher meat and food only" or "we sell nonkosher meat and food only", or "we sell both kosher and

nonkosher meat and food" is guilty of a misdemeanor. Possession of nonkosher meat and food, in any place of business advertising the sale of kosher meat and food only, is presumptive evidence that the person in possession exposes the same for sale with intent to defraud, in violation of the provisions of this section.

(3) A person who, with intent to defraud, sells or exposes for sale in any hotel, restaurant or other place where food products are sold for consumption on or off the premises, any meat or meat preparations, article of food or food products, and falsely represents the same to be kosher, whether such meat or meat preparations, article of food or food products be raw or prepared for human consumption, either by direct statement orally, or in writing, which might reasonably be calculated to deceive or lead a reasonable man to believe that a representation is being made that such food is kosher or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word "kosher" in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, or both kosher and nonkosher food or food products, either raw or prepared for human consumption, and who fails to indicate on his window signs and all display advertising, in block letters at least 4 inches in height, "kosher and nonkosher food sold here", or who exposes for sale in any show window or place of business both kosher and nonkosher food or food products, either raw or prepared for human consumption, and who fails to display over each kind of food or food preparation so exposed a sign in block letters at least 4 inches in height reading "kosher food" or "nonkosher food", or who displays on his window, door or in his place of business, or in handbills or other printed matter distributed in or outside of his place of business, words or letters in Hebraic characters other than

the word "kosher", or any sign, emblem, insignia, 6-pointed star, symbol or mark in simulation of same, without displaying in conjunction therewith in English letters of at least the same size as such characters, signs, emblems, insignia, symbols or marks the words "we sell kosher food only" or "we sell nonkosher food only", or "we sell both kosher and nonkosher food", is guilty of a misdemeanor. Possession of nonkosher food, in any place of business advertising the sale of kosher food only, is presumptive evidence that the person in possession exposes the same for sale with intent to defraud, in violation of the provisions of this section.

(4) No person shall:

(a) Wilfully mark, stamp, tag, brand, label or in any other way or by any other means of identification represent or cause to be marked, stamped, tagged, branded, labeled or represented as kosher food or food products not kosher or not so prepared.

(b) Wilfully remove, deface, obliterate, cover, alter or destroy, or cause to be removed, defaced, obliterated, covered, altered or destroyed the original slaughterhouse plumba or any other mark, stamp, tag, brand, label or any other means of identification affixed to foods or food products to indicate that such foods or food products are kosher.

(c) Knowingly sell, dispose of or have in his possession, for the purpose of resale to any person as kosher, any food or food products not having affixed thereto the original slaughterhouse plumba or any other mark, stamp, tag, brand, label or other means of identification employed to indicate that such food or food products are kosher or any food or food products to which such plumba, mark, stamp, tag,

brand, label or other means of identification has or have been fraudulently affixed.

(5) The department of agriculture shall investigate, inspect and supervise the sale of meat and meat preparations and enforce the provisions of this act. The department may promulgate rules and regulations for the enforcement and administration of this act in accordance with the provisions of Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to 24.80 of the Compiled Laws of 1948, and subject to Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110 of the Compiled Laws of 1948.

(6) Any person who violates the provisions of this section is guilty of a misdemeanor.

MINNESOTA

MINN. STAT. ANN. § 31.651 (West 2002)

Kosher products, unlawful sale

Subdivision 1. Kosher requirements. No person shall sell or expose for sale any poultry, poultry products, meat, or meat preparations and falsely represent the same to be kosher, whether such poultry, poultry products, meat, or meat preparations be raw or prepared for human consumption; nor shall the person permit any such products or the contents of any package or container to be labeled or to have inscribed thereon the word "kosher" in any language unless such products shall have been prepared or processed in accordance with orthodox Hebrew religious requirements sanctioned by a recognized rabbinical council.

Subd. 2. Notice required. Any person who sells or exposes for sale in the same place of business both kosher and nonkosher poultry, meat, or meat preparations, either raw or prepared for human consumption, shall indicate on window signs and all display advertising, in block letters at least four inches in height, "kosher and nonkosher meat and poultry sold here"; and shall display over each kind of poultry, meat, or meat preparation so exposed a sign, in block letters at least two inches in height, reading, "kosher meat," "kosher poultry," "nonkosher meat," or "nonkosher poultry," as the case may be; provided that subdivision 2 shall not apply to persons selling or offering for sale kosher poultry, poultry products, meats, or meat products solely in separate consumer packages, which have been prepackaged and properly labeled "kosher."

Subd. 3. Presumption. Possession of nonkosher poultry, poultry products, meat, or meat preparations in any place of business shall be presumptive evidence that the person in possession thereof exposes the same for sale.

Subd. 4. Prima facie evidence. The absence of a duly sanctioned kosher "plumba," mark, stamp, tag, brand, or label from any poultry, poultry products, meat, meat preparation, or food product shall be prima facie evidence that such product is nonkosher.

MISSOURI

MO. ANN. STAT. § 196.165 (West 2002)

Falsely representing food to be kosher prohibited, penalty—kosher defined

Any hotel, inn, delicatessen, grocery or butcher shop, or restaurant keeper, or any individual, firm or corporation,

carrying on and conducting a boardinghouse, eating house, lunchroom business, or engaged in the catering business (all hereinafter referred to as "person"), who shall with intent to defraud, sell, prepare or expose for sale, any meat or meat preparation, articles of food or food products, either raw or prepared for human consumption, whether the same is to be consumed on the premises where prepared and sold, or whether same is taken or carried elsewhere for consumption, falsely represents such food or food preparation to be kosher, that is, that same is prepared under and of products sanctioned by the orthodox Hebrew religious rules and requirements; or who shall falsely represent that such meat or meat preparation, food or food product is, or will be prepared and served in accordance with such orthodox Hebrew religious rules and requirements, by displaying a sign or signs, in, on, or about said person's place of business or establishment, or by advertisement in any newspaper, magazine, or periodical, or by publication in any other manner whatsoever, the intent and purpose whereof shall be to represent to the public by such advertisement, or any other manner whatsoever, that kosher meat or meat preparations, or food or food products are prepared and sold in such place of business or establishment, or served therein, or prepared or sold to be taken for consumption elsewhere than on said premises; or who prepares, sells, serves, or prepares for sale, either to be consumed on the premises, or elsewhere, both kosher and nonkosher meat or meat preparations, or food or food products in the same place of business, who fails to keep separate kitchens and dining rooms, wherein meat or meat preparations, or food or food products are prepared and served; or who fails to keep and use separate and distinctly labeled or marked dishes and utensils wherein such meat or meat preparation of food or food product is prepared and served; or who shall fail to indicate on all signs and display advertising, in, on, or about said person's premises, in block letters, at least four inches in height, "kosher and nonkosher

food prepared and sold here", as the case may be, or persons dealing in kosher meat or meat preparations, kosher food or food products only and persons dealing in both kosher and nonkosher meat or meat preparations, kosher and nonkosher food or food products who fail to adhere to and abide by orthodox Hebrew religious rules and requirements, shall be guilty of a misdemeanor, punishable by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or by imprisonment of not less than thirty days nor more than one year, or both. Possession of nonkosher meat or meat preparation, or food or food product in any place of business advertising the sale of kosher meat and food only, is prima facie evidence that the person in possession exposes the same for sale with intent to defraud in violation of the provisions of this section.

OHIO

OHIO REV. CODE ANN. § 1329.29 (West 2002)

Misrepresentation in Sale of Kosher Foods; Warning Before Prosecution

(A) No person shall do any of the following:

(1) Sell or expose for sale at retail, or manufacture, any meat or meat preparations or any fowl or preparations from fowl and falsely represent the same to be "kosher" or as having been prepared under, and of a product or products sanctioned by, the Orthodox Hebrew religious requirements;

(2) Falsely represent any food products or the contents of any package or container to be constituted and prepared as described in division (A)(1) of this section by having or permitting to be inscribed thereon "kosher," "kosher style," "kosher type," "kosher for passover," "Jewish," or "Hebrew"

in any language, or have "kosher," "kosher style," "kosher type," "kosher for passover," "Jewish," or "Hebrew" inscribed on the front of any retail business establishment in any language except the terms "Jewish," "Hebrew," "kosher style," or "kosher type" may be used on packages or containers only if the packages or containers are also marked "nonkosher" in easily readable print;

(3) Sell or expose for sale at retail in the same place of business both kosher and nonkosher meat or meat preparations either raw or prepared for human consumption unless he indicates on his window signs and all display advertising in block letters at least four inches in height, "kosher and nonkosher food served here." However, if the person sells only kosher meat or kosher meat preparations that are prepackaged for sale, he is exempt from this division.

(4) Make any direct statement, either orally or in writing, display the words "kosher," "kosher style," "kosher type," "kosher for passover," "Jewish," or "Hebrew" in any language, or display any insignia, six-pointed star, or other mark that might reasonably be calculated to deceive or lead a reasonable person to believe a product is "kosher" or sanctioned by Orthodox Hebrew religious requirements, if it is not.

(B) All prepackaged meats and poultry sold or exposed for sale at retail as "kosher" shall be soaked and salted. All other fresh meats and poultry sold or exposed for sale at retail as "kosher" shall be marked, on the label when packaged or by a sign when not packaged, with the words "soaked and salted" or "not soaked and salted," whichever is applicable. All advertisements for food or food products sold or exposed for sale as "kosher" under rabbinical supervision must identify the name of the rabbi or organization, if any, that

certified the food or food products as being "kosher."

(C) Any retailer who, at the end of the business day on the effective date of this amendment, has in his inventory products that are not "kosher" but are marked "kosher style," "kosher type," "kosher for passover," "Jewish," or "Hebrew" may continue to sell those products if he marks them "nonkosher" either on their labels or on display advertising in block letters at least four inches in height.

(D) The department of agriculture shall enforce this section and for such purpose any person designated by the department may enter upon premises where food represented to be kosher is sold or exposed for sale, at any reasonable time during business hours to inspect such food.

Whenever the department determines that a person is violating this section and has received no previous warning under this section, it shall issue a warning to that person specifying what actions he needs to take in order to comply with this section and notifying him that he has ten days after his receipt of the warning to take those actions. If, at the end of the ten-day period, the department determines that the person still is not in compliance with this section, the violator is subject to strict criminal liability, as provided in division (B) of section 2901.21 of the Revised Code.

If a person has received a previous warning under this section or has been found in violation of this section, he shall receive no warning under this division concerning subsequent noncompliance with this section and is subject to strict criminal liability, as provided in division (B) of section 2901.21 of the Revised Code. No action may be maintained against a retail seller for a violation of this section unless:

(1) He fails to comply with a warning issued under division (D) of this section; or

(2) He had actual knowledge or should have had knowledge that the product offered for sale did not comply with this section.

PENNSYLVANIA

PA. STAT. ANN. tit. 18, § 4107.1 (West 2002)

Deception relating to kosher food products

(a) Offense defined.--A person commits a misdemeanor of the third degree if in the course of business, he knowingly sells or exposes for sale any food product represented as kosher or kosher style when such food product is not kosher, said representation having been made orally, in writing or by display on the premises of such sign, mark, insignia or simulation reasonably calculated to induce an individual to believe that said food product is kosher.

(b) Definitions.--As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Food product." Any article whether in raw or prepared form which is utilized in human consumption.

"Kosher" or **"kosher style."** A food product having prepared, processed, manufactured, maintained and vended in accordance with the requisites of traditional Jewish law.

RHODE ISLAND

R.I. GEN. LAWS § 21-16-1 (2001)

Violations or deception as to religious dietary laws by dealers in meats

A person, firm, or corporation shall be guilty of a misdemeanor:

(a) Who shall knowingly sell or expose for sale any meat or meat preparation, either raw or prepared for human consumption, and falsely represent the same to be kosher or as having been prepared under the supervision of a rabbi or as a product or products sanctioned by the traditional or orthodox Hebrew religious requirements and dietary laws, or

(b) Who shall falsely represent any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word "kosher" in any language, or

(c) Who shall sell or expose for sale in the same place of business both kosher and nonkosher meat or meat preparation, either raw or prepared for human consumption, who fails to indicate on the window signs and all display advertising, in block letters at least four inches (4") in height, "kosher and nonkosher meat sold here," or

(d) Who shall expose for sale in any show window or place of business both kosher and nonkosher meat or meat preparation, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches (4") in height reading "kosher meat" or "nonkosher meat," as the case may be, or

(e) Who shall, while dealing or purporting to deal in kosher meat or meat preparations, prepare or handle or sell, or cause to be prepared or handled or sold, any food product which, when so prepared or handled or sold together with kosher meat or meat preparation, constitutes a violation of the traditional or orthodox Hebrew religious requirements and dietary laws, and thereby render such kosher meat or meat preparation, so prepared or handled or sold in conjunction therewith, nonkosher, or

(f) Who shall otherwise in the preparation, handling, or sale of kosher meat or meat preparation fail to comply strictly with the religious requirements and dietary laws necessary to constitute the meat or meat preparation genuinely kosher, or

(g) Who shall, without complying with such religious or dietary laws, issue or maintain any sign or advertisement in any language purporting to represent that he or she sells or deals in kosher meat or meat preparations, or

(h) Who shall display on his or her window, door, or in his or her place of business, words or letters in the Hebrew language, or any sign, emblem, insignia, symbol, or mark in simulation of Hebrew words or letters, the display of which might reasonably be calculated to deceive or lead a person to believe that a representation, express or implied, is being made that the meat or meat preparation exposed for sale is kosher and in conformity with the traditional or orthodox Hebrew religious requirements.

TEXAS

TEX. BUS. & COM. CODE ANN. § 17.821 (Vernon 2001)

Definitions

In this chapter:

(1) "Kosher food" means food prepared and served in conformity with orthodox Jewish religious requirements.

(2) "Label" means a display of written, printed, or graphic matter on the immediate article or container of any food product.

(3) "Person" includes an individual, corporation, or association.

(4) "Restaurant" means a place where food is sold for on-premises consumption.

(5) "Retail store" means any retail grocery store, delicatessen, butcher shop, or other place where food is sold for off-premises consumption.

(6) "Sell" means to offer for sale, expose for sale, have in possession for sale, convey, exchange, barter, or trade.

VIRGINIA

VA. CODE ANN. § 18.2-236 (West 2002)

Regulating sale of kosher meat and meat preparations

Any person, who, with intent to defraud, sells or exposes for sale any meat or meat preparation, and falsely represents the

same: (1) to be kosher, whether such meat or meat preparation be raw or prepared for human consumption, or (2) as having been prepared under, and of a product or products sanctioned by, the orthodox Hebrew religious requirements; or who, with like intent, falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word "kosher" in any language, shall be guilty of a Class 1 misdemeanor.

WISCONSIN

WIS. STAT. ANN. § 97.56 (West 2002)

Kosher meat

(1) Under this section "kosher" means prepared in accordance with the Jewish ritual and sanctioned by Hebrew orthodox religious requirements.

(2) No person may, with intent to defraud, do any of the following:

(a) Sell or expose for sale any meat or meat preparation, whether raw or prepared for human consumption, and falsely represent the meat or meat preparation to be kosher, and as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements.

(b) Falsely represent any food product or the contents of any package or container to be kosher and as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements, by having or permitting to be inscribed on the package or container the word "kosher" in any language.

(c) Sell or expose for sale in the same place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, unless all of that person's window signs and display advertising indicate, in block letters at least 4 inches in height, "Kosher and Nonkosher Meat Sold Here".

(d) Expose for sale in any show window or place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, unless the person displays over each kind of meat or meat preparation so exposed a sign in block letters at least 4 inches in height reading "Kosher Meat", or "Nonkosher Meat", as the case may be.

(3) No person, with intent to defraud, may do any of the following:

(a) Sell or expose for sale, in any restaurant or other place where food products are sold for consumption on the premises, any article of food or food preparations that is falsely represented to be kosher and as having been prepared in accordance with the orthodox Hebrew religious requirements.

(b) Sell or expose for sale in any restaurant or other place both kosher and nonkosher food or food preparations for consumption on the premises when not prepared in accordance with the Jewish ritual and not sanctioned by the Hebrew orthodox religious requirements unless the person's window signs and display advertising state, in block letters at least 4 inches in height, "Kosher and Nonkosher Food Served Here".

APPENDIX E

New York Agriculture & Markets Law § 201-a (McKinney 2002)

Sale of kosher meat and meat preparations, kosher articles of food and food products

1. A person who, with intent to defraud, sells or exposes for sale any meat or meat preparations, article of food or food products, and falsely represents the same to be kosher or kosher for Passover, whether such meat or meat preparations, article of food or food products, be raw or prepared for human consumption, or as having been prepared under, and of a product or products sanctioned by, the orthodox Hebrew religious requirements, either by direct statement orally, or in writing, which might reasonably be calculated to deceive or lead a reasonable man to believe that a representation is being made that such food is kosher or prepared in accordance with the orthodox Hebrew religious requirements, or falsely represents any food products or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word "kosher" or "kosher-style" in any language; or sells or exposes for sale a non-kosher meat or meat preparation, or food or food product, which is labeled or advertised with the words "Jewish" or "Hebrew", either alone or in conjunction with the words "style" or "type" or any similar expression, unless the word "non-kosher" is displayed in English letters, of at least the same size as the words "Jewish" or "Hebrew", either alone or in conjunction with the words "style" or "type" or any similar expression; or sells or exposes for sale in the same place of business both kosher and non-kosher meat or meat preparations, or both kosher and non-kosher food or food products, either raw or prepared for human consumption, and who fails to indicate on his window signs

and all display advertising, in block letters at least four inches in height, "kosher and non-kosher meat sold here", or "kosher and non-kosher food sold here"; or who exposes for sale in any show window or place of business both kosher and non-kosher meat or meat preparations, or kosher and non-kosher food or food products, either raw or prepared for human consumption, and who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading "kosher meat", or "non-kosher meat", as the case may be, or "kosher food" or "non-kosher food", as the case may be, or who displays on his window, door, or in his place of business, or in hand-bills or other printed matter distributed in or outside of his place of business, words or letters in Hebraic characters other than the word "kosher", or any sign, emblem, insignia, six-pointed star, symbol, or mark in simulation of same, without displaying in conjunction therewith in English letters of at least the same size as such characters, signs, emblems, insignia, symbols, or marks, the words "we sell kosher meat and food only", or "we sell non-kosher meat and food only", or "we sell both kosher and non-kosher meat and food", as the case may be, is guilty of a class A misdemeanor, except that a person who with intent to defraud sells or exposes for sale on premises any meat or meat preparations and falsely represents the same to be kosher or kosher for Passover, provided said meat or meat preparations in violation has a retail value in excess of five thousand dollars, whether such meat or meat preparations be raw or prepared for human consumption, is guilty of a class E felony. Possession of non-kosher meat and food, in any place of business advertising the sale of kosher meat and food only, is presumptive evidence that the person in possession exposes the same for sale with intent to defraud, in violation of the provisions of this section.

2. All fresh meats, meat by-products, meat food products and poultry offered for sale at retail as kosher shall be marked on the label when packaged or by a sign when not packaged, with the words "soaked and salted" or "not soaked and salted" as the case may be. Such words when marked on the label or by a sign shall be in letters at least as large as the letters of the words on the label or sign designating such meat, meat by-products, meat food products and poultry as kosher.

3. Fresh meat, meat by-products, meat food products and poultry shall be defined as meat or poultry that has not been processed, except for salting and soaking.

4. Every person who sells or exposes for sale, at wholesale or retail, any kosher meat, meat by-products, meat food products or poultry shall retain all records with respect to the origin of such kosher meat, meat by-products, meat food products or poultry, which records shall be subject to inspection by the department; provided however that prepackaged kosher meat, meat by-products, meat food products or poultry labelled as Kosher by the packer thereof shall be excepted from the record keeping requirements of this subdivision, provided that the package contains the name and address of the seller. Such records shall include bills of sale, invoices, bills of lading and receiving and shipping papers. Every record required to be maintained under this subdivision shall be retained for a period of two years after December thirty-first of the year in which the transaction to which the record related has occurred and for such further period as the commissioner may require for purposes of any investigation or litigation under this article, by written notice to the person required to keep such records.

New York Agriculture & Markets Law § 201-b(1) (McKinney 2002)

Sale of kosher meat and food in hotels and restaurants

1. A person who, with intent to defraud, sells or exposes for sale in any hotel, restaurant, or other place where food products are sold for consumption on or off the premises, any meat or meat preparations, article of food or food products, and falsely represents the same to be kosher or kosher for Passover, whether such meat or meat preparations, article of food or food products be raw or prepared for human consumption, or as having been prepared under, and of a product or products sanctioned by, the orthodox Hebrew religious requirements, either by direct statement orally, or in writing, which might reasonably be calculated to deceive or lead a reasonable man to believe that a representation is being made that such food is kosher or prepared in accordance with the orthodox Hebrew religious requirements, or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word "kosher" or "kosher- style" in any language; or sells or exposes for sale a non-kosher meat or meat preparation, or food or food product, which is labeled or advertised with the words "Jewish" or "Hebrew", either alone or in conjunction with the words "style" or "type" or any similar expression, unless the word "non-kosher" is displayed in English letters, of at least the same size as the words "Jewish" or "Hebrew", either alone or in conjunction with the words "style" or "type" or any similar expression; or sells or exposes for sale in the same place of business both kosher and non-kosher meat or meat preparations, or both kosher and non-kosher food or food products, either raw or prepared for human consumption, and who fails to indicate on his window signs and all display advertising, in block letters at least four

inches in height, "kosher and non- kosher food sold here", or who exposes for sale in any show window or place of business both kosher and non-kosher food or food products, either raw or prepared for human consumption, and who fails to display over each kind of food or food preparation so exposed a sign in block letters at least four inches in height reading "kosher food" or "non-kosher food", as the case may be, or who displays on his window, door, or in his place of business, or in handbills or other printed matter distributed in or outside of his place of business, words or letters in Hebraic characters other than the word "kosher", or any sign, emblem, insignia, six-pointed star, symbol, or mark in simulation of same, without displaying in conjunction therewith in English letters of at least the same size as such characters, signs, emblems, insignia, symbols, or marks the words "We sell kosher food only," or "We sell non-kosher food only," or "We sell both kosher and non-kosher food", as the case may be, is guilty of a misdemeanor, except that a person who with intent to defraud sells or exposes for sale on premises any meat or meat preparations and falsely represents the same to be kosher or kosher for Passover, provided said meat or meat preparations in violation has a retail value in excess of five thousand dollars, whether such meat or meat preparations be raw or prepared for human consumption, is guilty of a class E felony. Possession of non-kosher food, in any place of business advertising the sale of kosher food only, is presumptive evidence that the person in possession exposes the same for sale with intent to defraud, in violation of the provisions of this section.

New York Agriculture & Markets Law § 201-c (McKinney 2002)

Fraudulent identification of food and food products

No person shall: 1. Wilfully mark, stamp, tag, brand, label or in any other way or by any other means of identification, represent or cause to be marked, stamped, tagged, branded, labeled or represented as kosher, or as kosher-style, or as having been prepared in accordance with the Hebrew orthodox religious requirements food or food products not kosher or not so prepared, or

2. Wilfully remove, deface, obliterate, cover, alter, or destroy or cause to be removed, defaced, obliterated, covered, altered or destroyed the original slaughter-house plumba or any other mark, stamp, tag, brand, label or any other means of identification affixed to foods or food products to indicate that such foods or food products are kosher or have been prepared in accordance with the Hebrew orthodox religious requirements, or

3. Knowingly sell, dispose of or have in his possession, for the purpose of resale to any person as kosher, any food or food products not having affixed thereto the original slaughter-house plumba or any other mark, stamp, tag, brand, label or other means of identification employed to indicate that such food or food products are kosher or have been prepared in accordance with the Hebrew orthodox religious requirements or any food or food products to which such plumba, mark, stamp, tag, brand, label or other means of identification has or have been fraudulently affixed.

New York Agriculture & Markets Law § 201-e(2-a) (McKinney 2002)

Kosher and kosher for Passover identification

2-a. In the event that non-prepackaged fresh meat or poultry is sold and delivered off-premises as Kosher the meat or poultry and the bill of sale, if any, rendered at the time of delivery shall have affixed to them a label or the printed words "not soaked and salted" or "soaked and salted" as the case may be.

New York Agriculture & Markets Law § 201-e(3-c) (McKinney 2002)

Kosher and kosher for Passover identification

3-c. Any person or firm owning or operating a slaughterhouse which produces meat or poultry which is offered as kosher in this state shall keep records with respect thereto, subject to inspection by the department, regarding the time, place, date, person or organization supervising the slaughter of the animal and the number of animals slaughtered in accordance with orthodox Hebrew religious requirements.

Every record required to be maintained under this subdivision shall be retained for a period of two years after December thirty-first of the year in which the transaction to which the record relates has occurred and for such further period as the commissioner may require for purposes for any investigation or litigation under this section, by written notice to the person required to keep such records under this subdivision.

Every record required to be maintained under this subdivision shall be attested to by the person or organization supervising the slaughter immediately following the completion of such slaughtering activities and preparation of such records.

New York Agriculture & Markets Law § 26-a (McKinney 2002)

Advisory board on kosher law enforcement

1. There is hereby established in the department an advisory board on kosher law enforcement which shall consist of nine members, to be appointed by the commissioner of the department of agriculture and markets. Of the members first appointed, three shall be appointed for terms of one year, three for terms of two years and three for terms of three years. Their successors shall be appointed for terms of three years. The commissioner shall designate one of such appointees to be chairman of the advisory board. The advisory board may elect from its membership, a vice-chairman and a secretary. Vacancies in the membership of the advisory board occurring from any cause, shall be filled by the commissioner for the unexpired term.

2. The commissioner may detail from time to time to the assistance of the advisory board such employees of the department as may be required, and shall provide suitable space in the offices of the department for the meetings and records of the advisory board.

3. The advisory board shall meet at the call of the commissioner and at such other times as it may deem necessary and at such places as may be convenient.

4. It shall be the duty of the advisory board hereby

established to advise, counsel and confer with the commissioner on matters of policy in connection with the administration and enforcement of laws and rules relating to kosher meats, meat preparations, and food products, to consider all matters submitted to it by the commissioner, and on its own initiative to recommend to the commissioner such changes in the laws or rules relating to the possession, sale and exposure for sale of kosher meats, meat preparations, and food products, as may be deemed advisable to secure the effective administration and enforcement of such laws and rules and, with the consent of the commissioner, to submit for enactment by the legislature such draft or drafts of legislation imposing such further restrictions on the possession, sale and exposure for sale of kosher meats, meat preparations and food products, as may be deemed necessary.

5. The advisory board shall adopt rules and regulations to govern its own proceedings. The secretary shall keep a complete record of all its proceedings which shall show the names of the members present at each meeting and any action taken by the advisory board. The record shall be filed in the office of the department. All records and other documents of the department relating to matters within the jurisdiction of the advisory board shall be subject to inspection by members of the advisory board.

6. The members of the advisory board shall receive no compensation for their services hereunder, but they shall be entitled to reimbursement for their actual and necessary traveling and other expenses heretofore or hereafter incurred by them in connection with the performance of their duties under this section.

No. 02-675

Supreme Court, U.S.
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In The
Supreme Court of the United States

SHELDON SILVER, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH-NATIONAL SOCIETY OF HEBREW DAY SCHOOLS and UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Petitioners,

v.

COMMACK SELF-SERVICE KOSHER MEATS, INC. d/b/a COMMACK KOSHER, BRIAN YARMEISCH, and JEFFREY YARMEISCH,

Respondents,

and

RABBI LUZER WEISS, AS DIRECTOR OF THE KOSHER LAW ENFORCEMENT DIVISION OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent Commack Self-Service Kosher Meats, Inc., d/b/a Commack Kosher, has no parent or subsidiary corporations and no public corporation holds any of said Respondent's stock.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Commack Self-Service Kosher Meats, Inc., d/b/a Commack Kosher, Brian Yarmeisch and Jeffrey Yarmeisch respectfully respond to the petition of Sheldon Silver, Abe Alper, Jon Greenfield, Jack Lee, Rabbi Moshe Portnoy, Richard Schwartz, Agudath Harabonim of the United States and Canada, Agudath Israel of America, National Council of Young Israel, Rabbinical Alliance of America, Torah Umesorah-National Society of Hebrew Day Schools and Union of Orthodox Jewish Congregations of America [hereinafter the "Petitioners"] for a Writ of Certiorari to review the decision of the United States Circuit Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Petitioners bring on this Petition for a Writ of Certiorari in an attempt to reverse the opinion of the United States Court of Appeals for the Second Circuit, reported at 294 F.3d 415 (2d Cir. 2002), a copy of which is set forth in Appendix A to the Petitioners' Petition; an opinion which affirms the decision of the United States District Court for the Eastern District of New York, *Commack Self-Service Meats v. Rubin*, 106 F.Supp. 2d 445, a copy of which is set forth at Appendix C of the Petitioners' Petition.

COUNTER-STATEMENT OF THE CASE

The underpinning of this case is the unconstitutionality of §201-a, §201-b, §201-c, §201-e, §201-f, §201-h and §26-a of the New York State Agriculture & Markets Law [hereinafter the "Statute"], pursuant to which the State interprets and enforces Jewish religious doctrine. The Statute purports to prevent or punish fraud in the sale of *kosher* food products.

The Petitioners expose the fatal flaw in their position in the very question they present, to wit: by arguing that it is constitutional for the State to accept an undefined consumer consensus as a basis for legislation denying non-orthodox Jews of the freedom to practice their religion.

While over the years the term "*kosher*" has been incorporated into the vernacular, *kosher*, in the context of the challenged statute, speaks the dogma of Judaism. It is generally conceded that, even within the orthodox Jewish community, there is no unanimity in the interpretation of the laws governing what is *kosher*. The result is that "to assert that a food article does not conform to *kosher* requirements, New York must take an official position as to what are the *kosher* requirements. In doing so, the [State] must either interpret religious doctrine or defer to the interpretations of religious officials and reach its official position." *Commack Self-Service Kosher Meats, Inc. v. Weiss,* 294 F.3d 415, 427 (2d Cir. 2002).

The problem is compounded by the fact that the Jewish laws, which the challenged Statute attempts to regulate, are found in the *Torah,* the first five books of the Jewish scriptures, and in the *Schulchan Aruch*, the Code of Jewish Law. The unconstitutionality of the Statute is underscored by the fact that the *Torah* and the *Schulchan*

Aruch are written in Hebrew and Aramaic. While the *Torah* has been translated into English, the *Yoreah Deah* tractate of the *Schulchan Aruch,* dealing with the laws of what is *kosher*, has not been translated into English. While there are commentaries in English on the *Yoreah Deah,* as a predicate to enforcing the Statute the State would have to determine which commentary was sufficiently authoritative to justify the State's reliance thereon. Of course, such approach ignores the fundamental truth that the *Schulchan Aruch* contains lengthy debates by Rabbis who try to interpret the laws and who are not always in agreement.

In the Jewish religion there is no one equivalent to the Pope and in the lower Courts it was undenied that *Pirkei Avot*, a compendium by Jewish sages of *Talmudic* legal rulings and *Halachic* axioms relating to the Jewish view on the sanctity of life and the ethical and moral principles guiding the Jewish way of life, mandates that one "get yourself a Rabbi." It is the Rabbi an individual selects who is the final authority for that person with respect to matters of Jewish law and practice. In support of such concept, Jewish law mandates that once a question has been posed to a Rabbi about Jewish observance and the Rabbi has rendered a decision, the question cannot be posed to another Rabbi. No Rabbi outranks another and, therefore, the observance of Judaism varies from Rabbi to Rabbi and community to community.

Just as the Protestant faith is comprised of many denominations, running the gamut from the Evangelical and Pentecostal sects to the Unitarian Universalist churches, in Judaism there are, *inter alia*, Hasidic sects, Orthodox Jews, Modern Orthodox Jews, Union for Traditional Judaism, Conservative Jews, Reform Jews and

Reconstructionist Jews. The orthodox Jewish community has publicly announced that non-orthodox denominations of Judaism are not legitimate sects of Judaism and the State of New York has been deferential to orthodox Judaism by attempting to enforce the Statute without regard to the fact that, in addition to the lack of unanimity of opinion, even amongst orthodox Jews, as to the Jewish *kosher* laws, non-orthodox denominations of Judaism have a different perspective on the Jewish *kosher* laws.

As the Second Circuit found:

> [T]here is considerable disagreement over what precepts or tenets truly represent the laws of kashrut. There are differences of opinion concerning the application and interpretation of the laws of kashrut both within Orthodox Judaism and between Orthodox Judaism and other branches of Judaism. *Ran-Dav's County Kosher v. New Jersey*, 129 N.J. 141, 147, 608 A.2d 1353 (1992) (citing Herman Wouk, *This Is My God* (1959), reprinted in *The Life of Torah* 98-99 (Jacob Neusner ed. 1974); Rabbi Hayim Halevy Donin, *To Be a Jew* 102-04, 112-19 (1972); Rabbi J. David Bleich, *Contemporary Halakic Problems* 84-92 (1977)). For example, Orthodox Jews of the Sephardic sect adhere to "glatt" kosher standards that are more stringent than those followed by other Orthodox Jews. Raphael Poliakoff, *What Is Glatt Kosher?*, Kashrus Newsletter, vol. 1, no. 5. As between different branches of Judaism, "Conservative and Orthodox rabbis differ sharply on many . . . issues" such as the kosher status of wine, cheese, sturgeon, and swordfish. Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 Col. J.L. &

> Soc. Probls. 1, 8 (1992). It is also widely recognized that "the strain between all three denominations [Orthodox, Conservative, and Reform] has increased in recent years." *Id.*
>
> We find it indisputable that there are differences of opinion within Judaism regarding the dietary requirements of *kashrut*. As a result, because the challenged laws interpret "kosher" as synonymous with the views of one branch, those of Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism. *Commack*, 294 F.3d 415.

The State's adoption of "orthodox Hebrew religious requirements" as the criteria is analogous to the State of New York declaring that, since Catholicism was the first denomination of Christianity, if another denomination of Christianity offered its members communion, they could only use a Eucharist and wine approved by the Roman Catholic Church; otherwise, the communion was illegitimate and the one offering communion was knowingly perpetrating a fraud. Similarly, are the Orthodox Christian sects (Russian, Armenian, Greek, etc.) perpetrating a fraud on their adherents because they do not celebrate Christmas and Easter when the other Christian faiths observe same?

The unavoidable conclusion is that in the State's attempt to regulate what is or is not *kosher*, "the State has effectively aligned itself with one side of an internal debate with Judaism," *Id.* 426, and has excessively entangled the State in religion. While the Petitioners concur with, and adopt, the findings of the courts below both as to the facts and the legal analysis, and incorporate same by reference herein, the Petitioners' reliance on an undefined

consensus has apparently escaped the District Court's and Circuit Court's attention.

The concept of the State legislating a religious issue, even if well intended to prevent consumer fraud, based upon an alleged consensus cannot pass constitutional muster. Who comprised the consensus? Who determined that the individuals/organizations comprising the consensus were knowledgeable and authoritative and, if so, who determined their knowledgability and authoritativeness? What criteria were used to judge the members of the purported consensus? What inquiry did the State make before adopting the alleged consensus?

In fact, whatever may have been the case in prior generations, the Petitioners would be misleading this Court to suggest that the orthodox Jewish community finds food designated *kosher* to be acceptable. Especially since the influx of Jewish immigrants after World War II, which immigrants have introduced their own customs and standards, the orthodox Jewish community has, by and large, rejected the designation *kosher* as adequate even where it was so designated by a duly ordained orthodox Rabbi. As the record below establishes, the orthodox Jewish community generally demands more stringent adherence to their interpretation of Judaism's *kosher* laws. As a practical matter, most orthodox Jews confine themselves to eating only "glatt *kosher*" meat[1] or food; food

[1] The bigger fraud would appear to be the fact that, despite the fact that poultry cannot be *"glatt" kosher*, some supervising agencies, including one of the Petitioners, designate poultry as *"glatt" kosher*. One of the Petitioners recently conceded that it no longer uses the term *"glatt"* to represent only *"glatt"* quadripeds, which is the only type of

(Continued on following page)

allegedly held to a more stringent level of observance of the Jewish *kosher* laws. One unavoidable fact is that the Statute enmeshes the State in the interpretation of Jewish doctrinal law.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

I

THE SECOND CIRCUIT PROPERLY ANALYZED THE APPLICATION OF THE ESTABLISHMENT CLAUSE

The Petitioners argue that because other states have enacted legislation which parallel the patently unconstitutional statute, this Court should intervene to reverse the Circuit Court's findings and decision. The Petitioners predicate their argument on the premise that if one knowingly sells something as *kosher* which is not *kosher* in accordance with "orthodox Hebrew religious requirements" one is perpetrating a fraud.

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animal to which the term can apply, but has adopted it as a designation of the product having met a higher standard. The then Director of the Division of Kosher Law Enforcement of the New York State Department of Agriculture and Markets [the "State"] testified at his deposition that even "*glatt*" *kosher* meat wasn't sufficiently *kosher* for him; he would only eat meat slaughtered under the supervision of a particular *hassidic* sect. Other orthodox Jewish witnesses, testifying on behalf of the Petitioners, conceded at their depositions that they too demanded a more stringent standard than *kosher* even if *kosher* was defined as "in accordance with orthodox Hebrew religious requirements."

It defies credulity that they propose such argument in light of the fact that it has been undenied that the "orthodox Hebrew religious requirements" are in a different language, either Hebrew or Aramaic, and the *Schulchan Aruch*, the text containing the *Yoreah Deah*, the tractate devoted to *kosher* issues, is characterized by a small amount of text surrounded by the commentary of sages of the time. It is critical to note that the *Yoreah Deah* reflects that on many issues there were disagreements between the commentators as to the meaning and/or implication of the text. The Petitioners' position notwithstanding, many say that that is one of the beauties of Judaism; one can follow the interpretations of the Rabbi they select to follow.[2] The differences of opinion between the commentators also probably explain, at least in part, why there is no translation of the *Yoreah Deah* tractate into English; only commentaries. The State conceded that it is unaware of any English translation of the *Yoreah Deah*.[3]

A factor which cannot be ignored is that, as reflected in the record below, the State's "enforcers" do not get any formal training in what purportedly constitutes *kosher* "in accordance with orthodox Hebrew religious requirements."

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[2] While not generally accepted, one of the renowned Rabbis whose commentaries are included in the *Yoreah Deah* opined that, since a chicken does not give milk, the reasoning behind the interpretation that one cannot mix milk products with dairy products [you cannot cook a goat in its mother's milk], a keystone of the *kosher* laws, would not apply to chickens and, therefore, it follows that, at least in that orthodox sage's opinion, a cheeseburger could be *kosher*.

[3] The Petitioners took an evasive position relying on commentaries of the *Yoreah Deah* well aware of the fact that, but for the fact that the commentators were not in agreement, one commentary should have sufficed.

According to the testimony adduced from the deposition witnesses, the inspectors' training has been comprised solely of accompanying an experienced inspector in their rounds for a period of time. As far as could be elicited from the deposition witnesses, including Rabbi Rubin who was then the Director of the Division, at the times relevant hereto, there were neither tests nor guide rules for inspectors to establish some uniformity in the interpretation as to what constitutes *kosher* in accordance with "orthodox Hebrew religious requirements." The State could not, or would not, produce any documents which were purportedly issued to inspectors which documents purportedly contained the rules governing what is *kosher* in accordance with "orthodox Hebrew religious requirements" or which otherwise established parameters for enforcement. Each inspector was evidently on their own. The lack of a more formal training program raises the spectre that the State of New York was well aware the the Statute infringed on the constitutional rights of non-orthodox Jews and felt that formal training or the issuance of written guidelines would only make the advocacy of orthodox Judaism ever more apparent.

As the record below establishes, the leading orthodox *kosher* supervisory agencies, including Petitioner Union of Orthodox Jewish Congregations, supported the formation of ACKO, also known as AKO, the basic purpose of which organization was to develop a uniform standard of what was *kosher* in accordance with "orthodox Hebrew religious requirements." Even they could not agree and, as far as can be discerned, the project was abandoned.

In apparent recognition that their position is, at best, tenuous, the Petitioners do not hesitate to wave the flag and appeal to mother, G-d and country. They argue that "[N]o Establishment Court decision of this Court has ever

invalidated a local law enacted to protect religiously observant Americans against deliberate deception by dishonest merchants who *intend* to defraud consumers." The argument is specious since, as previously set forth, there are no universally accepted rules as to what constitutes *kosher* in accordance with "orthodox Hebrew religious requirements." If the Petitioners were to prevail, the State would be directly interpreting and enforcing a fundamental tenet of Judaism, the *kosher* laws. The Petitioners would have this Court validate the State acting as a policeman of the religious observance of those who elect to deal in *kosher* foods.

It is respectfully submitted that before this Court entertains any idea of adopting the Petitioners' argument it examine the deposition testimony of David Zweibel. Mr. Zweibel, who identified himself as an officer and General Counsel to Petitioner Agudath Israel of America, testified that, notwithstanding the fact that he was a duly ordained orthodox Rabbi, he felt incompetent to answer questions about the Jewish laws governing what is *kosher;* he felt that it was too complicated and he, while an observant orthodox Jew, was too far removed from it to be in a position to offer any informed opinions beyond the most elementary facts. Mr. Zweibel's candor at his deposition only serves to underscore the Respondents' contention that it is not the State's place to attempt to oversee one's observance of the Jewish *kosher* laws.

Another fact which should not be overlooked is that to adopt the Petitioners' reasoning would deny Conservative Jews the right to practice their religion. A store selling *kosher* food targeting the Conservative Jewish *kosher* market would be in violation of the Statute for selling, *inter alia*, cheese, certain fish and wine which, while

acceptable under the Conservative Judaism's duly adopted, and published rules governing *kashruth,*[4] same are not generally accepted to be *kosher* in accordance with orthodox Hebrew religious requirements. The way the Statute is worded, even if such a proprietor was prepared to identify his store as Conservative *Kosher*, the store would be in violation because it did not observe in accordance with "orthodox Hebrew religious requirements" and, therefore, was in violation of §201-a(1) and §201-b(1). In fact, the orthodox Jewish community has been the beneficiary of a monopoly when it comes to *kosher* food. The Statue, at §201-a(1) and §201-b(1), requires anyone selling food, even *kosher* style food, which food is not *kosher* in accordance with orthodox Hebrew religious requirements to display a sign stating "non-*kosher.*" This rule transcends the mere issue of *kosher* food as it encompasses a sign/label identifying the food as "non-*kosher*" where there is no representation that the food is *kosher* but the food is labeled "Jewish" or "Hebrew" even if such designation is in a foreign language.

Petitioners would have this Court believe that the majority of consumers expect food identified as *kosher* to be *kosher* in accordance with "orthodox Hebrew religious requirements." This is a fiction contrived to bolster a weak case. The record below establishes that orthodox Jews patronize those establishments which are approved by the Rabbis they follow. They would not think to patronize a store that didn't have their Rabbis' approval except to purchase some pre-packaged food in which instance the

[4] *Kashruth* refers to the practice of keeping *kosher.*

food would have to bear the imprimatur of a *kosher* supervising agency approved by their Rabbi. The record reflects that, at the time the depositions were conducted, there were over 400 supervisory agencies identified by ***Kashrus Magazine***, a journal issued by an orthodox Jewish institution devoted to matters of *kashruth*. It is significant to note that ***Kashrus Magazine*** constantly reminds readers not to rely on the symbols of the various *kosher* supervision agencies listed without first consulting their Rabbi.

The State's adoption of "orthodox Hebrew religious requirements" as the criteria is analogous to the State of New York declaring that, since Catholicism was the first denomination of Christianity, if another denomination of Christianity offered its members Communion, they could only use a Eucharist and wine approved by the Roman Catholic Church; otherwise, the Communion was illegitimate and perpetrated a fraud. Similarly, are the Orthodox Christian sects (Russian, Armenian, Greek, etc.) perpetrating a fraud on their adherents because they do not celebrate Christmas and Easter when Catholicism and the other Christian faiths observe same?

The unavoidable conclusion is that in the State's attempt to regulate what is or is not *kosher*, "the State has effectively aligned itself with one side of an internal debate with Judaism," *Id.* 426, and excessively entangled the State in religion.

Petitioners' reliance upon this Court's decision in *Hygrade Provision Co. v. Sherman,* 266 U.S. 497 (1925), is misplaced. The Petitioners ignore the fact that the *Hygrade* case involved the Due Process Clause rather than the Establishment Clause. As the Petitioner should have recognized, it was not until some twenty (20) years after

the Court rendered the *Hygrade* decision that the Fourteenth Amendment was held applicable to the states. See *Everson v. Board of Education,* 330 U.S. 1, 15, 16 (1947).

> Like the Establishment Clause generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Illinois ex rel. McCollum v. Bd. Of Educ.*, 333 U.S. 203, 212, 68 S.Ct. 461, 92 L.Ed. 649 (1948).
>
> It appears to us that the challenged laws excessively entangle government and religion because they (1) take sides in a religious matter, effectively discriminating in favor of the orthodox Hebrew view of dietary requirements; (2) require the State to take an official position on religious doctrine; and (3) create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria.
>
> The Department [Department of Agriculture and Markets of the State of New York] argues that the challenged laws do not excessively entangle the government with religion because "no one disputes the meaning of the term 'kosher.'" There is ample evidence in the record to support the opposite conclusion. *Commack*, 294 F.3d 426-428.

The State of New York has been deferential to orthodox Judaism by attempting to enforce the challenged statute without regard to the fact that, aside from the lack of unanimity of opinion amongst orthodox Jews as to the Jewish *kosher* laws, non-orthodox denominations of

Judaism have a different perspective on the Jewish *kosher* laws.

As the Second Circuit found:

> [T]here is considerable disagreement over what precepts or tenets truly represent the laws of kashrut. There are differences of opinion concerning the application and interpretation of the laws of kashrut both within Orthodox Judaism and between Orthodox Judaism and other branches of Judaism." *Ran-Dav's County Kosher v. New Jersey,* 129 N.J. 141, 147, 608 A.2d 1353 (1992) (citing Herman Wouk, *This Is My God* (1959), reprinted in *The Life of Torah* 98-99 (Jacob Neusner ed. 1974); Rabbi Hayim Halevy Donin, *To Be a Jew* 102-04, 112-19 (1972); Rabbi J. David Bleich, *Contemporary Halakic Problems* 84-92 (1977)). For example, Orthodox Jews of the Sephardic sect adhere to "glatt" kosher standards that are more stringent than those followed by other Orthodox Jews. Raphael Poliakoff, *What Is Glatt Kosher?*, Kashrus Newsletter, vol. 1, no. 5. As between different branches of Judaism, "Conservative and Orthodox rabbis differ sharply on many . . . issues" such as the kosher status of wine, cheese, sturgeon, and swordfish. Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 Col. J.L. & Soc. Probls. 1, 8 (1992). It is also widely recognized that "the strain between all three denominations [Orthodox, Conservative, and Reform] has increased in recent years." *Id.*
>
> We find it indisputable that there are differences of opinion within Judaism regarding the dietary requirements of *kashrut*. As a result, because the challenged laws interpret "kosher" as synonymous with the views of one branch, those of

> Orthodox Judaism, the State has effectively aligned itself with one side of an internal debate within Judaism. *Commack*, 294 F.3d 415.

Furthermore, in *Hygrade* this Court qualified its finding by stating that the meaning of *kosher* was well enough defined "at least as a general thing." In the over eight decades which have elapsed since the Hygrade decision was rendered, the world has changed. Sixty or seventy years ago when someone spoke of "grass" there was no confusion – the reference was to the plant that grew on lawns and on which cattle and other animals fed. Today, "grass" is widelyrecognized as synonymous with "marijuana." Similarly, in the not so distant past the word "gay" described a cheerful, lighthearted excitement or, especially in matters of color, bright or lively. Currently, it is synonymous with a sexual orientation.

The term *kosher,* like "grass" and "gay" and innumerable other words, has gone through a metamorphosis. The post-World War II influx of Jewish immigrants resulted in the introduction to the United States of customs and traditions in the observance of the *kosher* laws which the immigrants had observed in their homelands. It created even greater diversity in the meaning of what was *kosher*. As the record before the Second Circuit conclusively demonstrated, today something which is merely *kosher* is unacceptable to many, if not most, of the orthodox Jewish community. Today the majority of the orthodox Jewish community only finds meat and poultry that is *glatt kosher*, *kosher LeMahadrin* or supervised by a limited number of supervising agencies to be acceptable.

In the final analysis the Petitioners are challenging the legitimacy of non-orthodox denominations of Judaism

and, the rhetoric notwithstanding, would prevent non-orthodox Jewish purveyors from selling fresh meat and poultry, groceries and prepared foods as *kosher* despite the fact that duly ordained Rabbis find same to be acceptably "*kosher.*" The Petitioners, in their poorly disguised quest to proselytize, force non-orthodox Jews to become more orthodox in their observance, has no reluctance to deny non-orthodox denominations of Judaism the inalienable right to practice their bona fide religion merely because the orthodox Jewish community disagrees with the tenets of the non-orthodox denominations.

It is offensive that the Petitioners would draw a parallel between the religious observance of non-orthodox denominations of Judaism and the defendants in *United States v. Ballard*, 322 U.S. 78 (1944). The mere suggestion of any analogy confirms that the Petitioners are engaged in a gambit to eliminate what they have declared to be the inauthentic and illegitimate strains of Judaism and their utilization of the State of New York as an ally in such gambit having been successfully challenged they appeal to this Court to help them in their crusade.

II

THE SECOND CIRCUIT WAS FULLY JUSTIFIED IN FINDING THE STATUTE TO BE UNCONSTITUTIONAL

It is indefensible for the Petitioners to acknowledge on the one hand the existence of non-orthodox streams of Judaism and then to come before this Court arguing that the Statute does not take sides. The record contained incontrovertible proof that the Statute is partial to the

orthodox Jewish community to the detriment of the non-orthodox denominations of Judaism. While the Petitioners have the inalienable right to believe that orthodox Judaism is the only authentic Judaism, they have no right to have the State of New York discriminate against those who do not share their beliefs.

The Petitioners rely on the affidavits they submitted in support of their position in the Ran-Dav case, *Ran-Dav's County Kosher, Inc. v. New Jersey*, 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied*, 507 U.S. 952 (1993) to corroborate their claim that "orthodox Judaism's" *kosher* standards, whatever they might be, are central to the observance of *kashruth*. In the first instance the ten (10) year old affidavits upon which the Petitioners rely obviously, and justifiably, were not sufficient to sway this Court to grant certiorari. More telling, however, is that the Petitioners were unable to garner any such support in this action. To the contrary, the United Synagogue of Conservative Judaism, the parent body for Conservative Jewish congregations, joined in an *amicus* brief before the Circuit Court in support of the Respondents.

Petitioners proceed to attempt to draw an analogy between the tenets of faith of non-orthodox denominations of Judaism and laws regulating the sale of wool or food identified as organic. Clearly, one's constitutional right to observe their religion is inviolate and to suggest that religious observance can be regulated by the state in the same way it would regulate commercial products is preposterous.

While it may prove unfortunate, the statute is flagrantly violative of the rights of non-orthodox Jews and if, as a result of this Court allowing the decision below to

stand, the unconstitutional laws of other states are of questionable constitutionality that is a problem those states will have to deal with. It certainly is not a plausible justification for ignoring the unconstitutionality of the Statute.

The Petitioners dismiss the relevancy of the Kosher Advisory Board arguing that it has no legal or administrative power to determine the standards for the enforcement of the *kosher* laws; "[I]t is, as its title declares, 'advisory' only." The Respondents respectfully suggest that the record below demonstrates that the Kosher Advisory Board played a significant role in the enforcement of the Statute; certainly the transcripts of the meetings of the Kosher Advisory Board in the record below prove that Petitioners' contention is untrue.

The Second Circuit also found the Petitioners' contention that there was a complete absence of Kosher Advisory Board[5] involvement in enforcement activities to be less than wholly accurate. *Commack,* 294 F.3d 429.

Judge Miner, writing for the Circuit Court, put it as follows:

> Although members of the Board do not directly participate in enforcement activities such as the actual inspection of kosher food establishments, issuance of citations, or pursuit of court action against alleged violators, we decline to take such a narrow view of the Board's involvement with enforcement of the challenged laws. To conclude otherwise, would be to exalt form over substance

[5] New York State Agriculture and Markets Law §26-a.

in light of the broad powers granted to the Board that substantially affect enforcement of the challenged laws.

[3] While we acknowledge that "some limited and incidental entanglement between church and state authority is inevitable in a complex modern society," *Larkin,* 459 U.S. at 123, 103 S.Ct. 505, "[w]here 'fusion' [of governmental and religious authority] is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." [*Board of Ed. Of Kiryas Joel v. Grumet,* 512 U.S. [687] at 699, 114 S.Ct. 2481.] In our case, the Board's purpose – to advise the Department regarding the requirements of Orthodox Jewish dietary laws – and the fact that, of the six Rabbis on the Board, all are Orthodox, convince us that New York's delegation of authority to the Board was made on the basis of religion and not "on principlesneutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority." *Id. at 699, 114 S.Ct. 2481.*

We find it insignificant that *section 26-a* does not require that Board members be Rabbis or even Orthodox Jews. Instead, we agree with the Fourth Circuit that even if membership [o]n the advisory Board were not restricted to adherents of Orthodox Judaism, or even if there were no [Advisory Board] at all, [the laws'] adoption of the Orthodox rules inevitably requires the intimate involvement of members of that faith, and the leaders of that faith, in discerning the applicable standard. *Barghout v. Bureau of Kosher*

Meat & Food Control, 66 F.3d 1337, 1343-44 (4th Cir. 1995); *Commack,* 294 F.3d at 429.

III

THE SECOND CIRCUIT PROPERLY ANALYZED AND APPLIED THE ESTABLISHMENT CLAUSE DECISIONS OF THIS COURT

The Court below unambiguously articulated its basis for rejecting the Petitioners' argument:

> As the Supreme Court has recently reiterated, in "cases involving facial challenges on Establishment Clause grounds, . . . we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)." *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (internal quotation marks and citations omitted). The *Lemon* factors require that a challenged law (1) have a valid secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion. 403 U.S. at 612-13. We treat the excessive entanglement prong as a part of our "inquiry into a statute's effect." *Agostini v. Felton*, 521 U.S. 203, 233 (1997). We find the challenged laws do not pass constitutional muster under the *Lemon* test because they have a primary effect that both advances and inhibits religion.[7] *Commack*, 294 F.3d at 425.
>
> FN7: Plaintiffs contend we should judge the constitutionality of these laws under the standard of strict scrutiny, as in *Larson v. Valente*, 456 U.S. 228, 246 (1982), and defendants claim that, because this is a facial attack, we should apply the rule of

> *United States v. Salerno*, 481 U.S. 739, 745 (1987), requiring the Plaintiff to show that "no set of circumstances exists under which the (statute) would be valid." We need not answer either question because we conclude for the reasons given that, as to both questions, the laws fail the test of constitutionality even using the assumptions that are most accommodating to the State.

Petitioners attempt to bolster its specious position by arguing that in matters of *kashruth* [the practice of being kosher] all Jews start with the "orthodox Hebrew religious requirement" as their common point of reference. In the footnote, n.6, the State represents that "Had those provisions required the State to favor orthodox Judaism over Conservative Judaism, the United Synagogue of America presumably would have opposed the legislation. While the Respondents do not know the circumstances surrounding the enactment of the Statute, apparently the Petitioner has forgotten that the United Synagogue of Conservative Judaism, the parent body for Conservative Jewish congregations, joined in an *amicus* brief to the Second Circuit in support of Respondents.

IV. THE CHALLENGED STATUTE CONSTITUTES A GOVERNMENT ENDORSEMENT OF RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE

It defies credibility that the Petitioner criticize the Second Circuit for failing to adopt the "reasonable observer's" viewpoint as to whether or not the challenged statute favors orthodox Judaism over other denominations of Judaism. It is undenied that virtually each of the

intervening organizations has publicly declared that non-orthodox denominations of Judaism are illegitimate and/or unauthentic. It appears to be that, consistent with the position of the Petitioners and their fellow members of the orthodox Jewish community, an acknowledged powerful voting block, the State has historically taken the position that, in the context of the challenged statute, *kosher* is synonymous with "orthodox Hebrew religious requirements."

Judge Gershon found that, as the Respondents contend, the settled interpretation of the challenged statute is that "*kosher*" means "in accordance with orthodox Hebrew religious requirements"; a conclusion she finds confirmed by the brief of Robert Abrams, as Attorney General of the State of New York, in *Ran-Dav's County Kosher, Inc. v. New Jersey*, 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied*, 507 U.S. 952 (1993), *Commack*, 106 F. Supp.2d 4, 450. The numerous judicial decisions holding that the Statute defines "*kosher*" as synonymous with "orthodox Hebrew religious requirements," collaterally estop the State from now arguing otherwise.

To enforce the Statute enmeshes religious leaders in the exercise of substantial government powers contrary to this court's consistent interpretation of the Establishment Clause; "the objective is to prevent, as far as possible, the intrusion of either Church or State into the precincts of the other." *Larkin v. Grendel's Den*, 459 U.S. 116, 126 (1982). "Some limited and incidental entanglement between church and state is inevitable in a complex modern society," *Id.* at 23. The Statute's adoption of orthodox Hebrew religious requirements as the criteria is neither "limited" nor "incidental," "'fusion of governmental and

religious functions'" in the area of religious dietary doctrine. *Id.* at 126. Such "direct cooperation between state officials and religious ministers" is flatly forbidden by the First Amendment, *McGowan v. Maryland,* 366 U.S. 420, 452 (1961), which prohibits a State from employing religious authorities as an adjunct of the civil law enforcement regime "to perform the function of interpreting and applying state standards." *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. at 451. The constitutional vice is compounded by the fact that the State, to enforce the regulations, must decide which religious authority's interpretation of Judaism's dietary laws is truly orthodox. In doing so the State must inevitably become embroiled in deciding ecclesiastical questions that are wholly inappropriate for resolution by civil authorities. *See, e.g., Presbyterian Church*, 393 U.S. at 440; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. at 709.

The *kosher* regulations are also violative of the Establishment Clause because the intermingling of state power and religious doctrine creates "the danger of political fragmentation and divisiveness on religious lines." *Grendel's Den*, 459 U.S. at 127. The record in this case conclusively establishes that the State's enforcement of the Statute provoked precisely the sort of turmoil identified by this Court in *Grendel's Den*. In that case, where the Court struck down a law delegating a role in liquor licensing to local churches, this Court noted the risk that this power could be "employed for specifically religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith." 459 U.S. at 125. In New York, the abuse was manifested by the State's targeting of purveyors of *kosher* food which was not under orthodox Jewish supervision.

In *Lee v. Weisman*, 112 S.Ct. 2649 (1992), this Court reasserted the proposition that the state must not insinuate itself into sectarian "religious debate," because "[a] state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 2657, 2658 (Kennedy, J., for the Court). "Government may neither promote nor affiliate itself with any religious doctrine or organization, nor may it obtrude itself in the internal affairs of any religious institution." *Id.* at 2661-62 (Blackman, J., joined by Stevens and O'Connor, JJ., concurring). This reflects the "Madisonian concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence." *Id.* at 2663 n.3 (Blackmun, J., joined by Stevens and O'Connor, JJ., concurring). By allowing the state courts to arbitrate between competing understandings of just what is *kosher* under Jewish law, the State "invite[s] the courts to engage in comparative theology. I can hardly imagine a subject less amenable to the competence of the . . . judiciary, or more deliberately to be avoided where possible." *Id.* at 2671 (Souter, J., joined by Stevens and O'Connor, JJ., concurring).

In *Weisman* even the dissenters agreed that the Establishment Clause "ruled out of order government-sponsored endorsement of religion – even when no legal coercion is present . . . – where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world, are known to differ." *Id.* at 2683-84 (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ., dissenting). The state may not "lend its

power to one or the other side in controversies over religious authority or dogma." *Employment Division, Dept. of Human Resources v. Smith*, 494 U.S. 872, 877 (1990) (Scalia, J., for the Court). That is precisely what the State has done and now tries to justify.

Thus, the nuances of the *Lemon* test and the controversy surrounding them are simply not implicated by the decision below. The outcome was dictated by Establishment Clause principles – on which this Court is unanimous – that forbid state involvement in sectarian religious debates and the use of coercive state power to promote religious doctrine. The decision below presents no occasion to choose between the *Lemon* test and any alternative "coercion" theory of the Establishment Clause.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 02-675

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IN THE

Supreme Court of the United States

SHELDON SILVER, ABE ALPER, JON GREENFIELD, JACK LEE, RABBI MOSHE PORTNOY, RICHARD SCHWARTZ, AGUDATH HARABONIM OF THE UNITED STATES AND CANADA, AGUDATH ISRAEL OF AMERICA, NATIONAL COUNCIL OF YOUNG ISRAEL, RABBINICAL ALLIANCE OF AMERICA, RABBINICAL COUNCIL OF AMERICA, TORAH UMESORAH-NATIONAL SOCIETY OF HEBREW DAY SCHOOLS and UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,

Petitioners,

v.

COMMACK SELF-SERVICE KOSHER MEATS, INC. D/B/A COMMACK KOSHER, BRIAN YARMEISH, AND JEFFREY YARMEISH,

Plaintiffs-Respondents,

and

RABBI LUZER WEISS, AS DIRECTOR OF THE KOSHER LAW ENFORCEMENT DIVISION OF THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS,

Defendant-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY MEMORANDUM

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SHELDON SILVER, *ET AL.*,

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v.

COMMACK SELF-SERVICE KOSHER MEATS, INC., *ET AL.*,

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and

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PETITIONERS' REPLY MEMORANDUM

I

THE NEW YORK LAW PROHIBITS INTENTIONAL COMMERCIAL FRAUD AND DOES NOT DENY ANYONE'S FREEDOM OF RELIGION

In declaring extravagantly that New York's consumer fraud law "den[ies] non-orthodox Jews . . . the freedom to practice their religion" (Br. in Opp. 2; see also Br. in Opp. 10-11, 16) and in postulating a number of extreme hypothetical analogies (Br. in Opp. 5, 12), the respondents ignore the limited reach of New York's law. It affects *only*

vendors of food. And it regulates their conduct *only* if they choose to exploit the word "kosher" in selling their products. And it regulates *only* deliberate misuse of that term by vendors who *know* that what they are selling does not satisfy the standard defined in the statute. None of these limitations apply to the "Catholic communion" hypothetical on which the respondents repeatedly rely.

Non-Orthodox Jews are entirely free under the New York law to sell, buy, or eat food that is kosher (or not kosher) by any standard. But both Orthodox and non-Orthodox Jews are prohibited from representing food as "kosher" (and thereby selling it at high prices) when they know that the food does not qualify by the standard that the term "kosher" has conveyed for centuries. This statutory restriction limits no person's freedom of religion, but it effectively protects the consumer who is seeking to purchase food that is truly "kosher."

The respondents' claims that the word "kosher" has "gone through a metamorphosis" (Br. in Opp. 15) and that the consensus expressed in affidavits of Conservative, Reform and Reconstructionist rabbis submitted ten years ago regarding the meaning of the term is now obsolete (Br. in Opp. 17) are factually unsound and are, in any event, not constitutional grounds to invalidate a statute that has been on the books in New York for more than 85 years and has been copied in many other jurisdictions. A State may protect consumers who understand "kosher" to mean what it meant ten years ago.

Finally, there is no significance to the fact that this Court denied certiorari in *Ran-Dav's Country Kosher, Inc. v. New Jersey*, 129 N.J. 141, 608 A.2d 1353 (1992), *cert. denied*, 507 U.S. 952 (1993). The New Jersey statute that was challenged in the *Ran-Dav's* case had no "intent to

defraud" requirement, so that even good-faith errors were subject to the law. Moreover, the Attorney General of New Jersey did *not* seek this Court's review of that decision. Only the private intervenors petitioned for a writ of certiorari. In the present case, the State of New York, through its Attorney General, has also filed a petition for a writ of certiorari.

II

THE RELIGION CLAUSE DOES NOT PROTECT DELIBERATE DECEPTION FOR MONETARY GAIN

In *Ryan v. Telemarketing Associates, Inc.*, No. 01-1806, this Court is currently considering the applicability of the First Amendment's Free Speech Clause to fraud by a fundraiser for charity. The *amicus curiae* brief of the Solicitor General in that case declares, in terms that apply to this case (pp. 6-7):

> The First Amendment does not preclude the government from prohibiting fraud or prosecuting those who intentionally deceive others for monetary gain. Intentional lies distort, rather than contribute to, the marketplace of ideas, and any value they have is outweighed by society's interest in protecting those harmed by deception. It has therefore been settled, for more than 60 years, that those who extract money through fraudulent misrepresentations are not shielded by the First Amendment – even though their misrepresentations are speech and even if

they solicit in the name of charitable causes. See, *e.g., Schneider v. State*, 308 U.S. 147, 164 (1939).

The court below invalidated a New York law that protects consumers against deliberate fraud on the ground that the Establishment Clause shields vendors who engage in such fraud when the subject is religious observance. The same considerations that led this Court to grant certiorari and to consider *Ryan v. Telemarketing Associates, Inc.*, No. 01-1806, which involves fraud in the area of constitutionally protected speech, warrant plenary review of the decision of the Second Circuit in this case.

CONCLUSION

For the foregoing reasons and those presented in our Petition and in the companion Petition in No. 02-672, a Writ of Certiorari should be granted.

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